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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

SHEETZ, INC.,

Petitioner,

v.

CHERYL L. VANDEVENDER,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the punitive damage award for employment discrimination in connection with the "first count," remitted by the West Virginia Supreme Court of Appeals from $1,575,000 to $1,108,740, is still so excessive as to violate the Due Process Clause of the Fourteenth Amendment in light of the absence of notice that punitive damages were recoverable for the statutory violations in question, the conceded absence of highly reprehensible conduct, and a 5-to-1 ratio of punitive damages to compensatory damages.

2. Whether the $1,124,000 punitive damage award for retaliatory discharge in connection with the "second count" is so excessive as to violate the Due Process Clause of the Fourteenth Amendment in light of the absence of notice that punitive damages were recoverable for the statutory violation in question, the isolated nature of the tortious conduct, and a 15-to-1 ratio of punitive damages to compensatory damages.

LIST OF PARTIES

Although Karen Foltz is listed as an Appellee on the caption of the decision appealed from, she did not participate in the proceeding before that court.

LIST OF PARENT COMPANIES AND SUBSIDIARIES

Sheetz, Inc. has no parent company. All of Sheetz, Inc.'s subsidiaries are wholly-owned.

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PETITION FOR A WRIT OF CERTIORARI

Sheetz, Inc. respectfully petitions for a writ of certiorari to review the judgment of the West Virginia Supreme Court of Appeals.

OPINIONS BELOW

The opinion of the West Virginia Supreme Court of Appeals is reported at 490 S.E.2d 678 and is reprinted here in Appendix A. (App. 1-41) The unpublished decision of the Circuit Court of Berkeley County, West Virginia, denying petitioner's post-trial motions is reprinted here in Appendix B. (App. 42-53) The unpublished judgment order of the circuit court is reprinted here in Appendix C. (App. 54-57) The unpublished order of the state supreme court denying petitioner's petition for rehearing is reprinted here in Appendix D. (App. 58)

JURISDICTION

The judgment of the West Virginia Supreme Court of Appeals was entered on July 11, 1997. The state supreme court denied a timely petition for rehearing on September 3, 1997.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property without due process of law."

STATEMENT

Respondent Cheryl L. Vandevender sued petitioner Sheetz, Inc. (Sheetz) for employment discrimination in violation of the West Virginia Human Rights Act, *W. Va. Code* § 5-11-1 *et seq.*, and Workers' Compensation Act, *W. Va. Code* § 23-5A-1 *et seq.* At trial, the jury returned a verdict of $2,999,066, against Sheetz. Of that amount, $2,699,000 took the form of two separate punitive damage awards. In denying Sheetz's motion for judgment notwithstanding the verdict and for new trial and/or remittitur, the trial court left both punitive damage awards intact. The West Virginia Supreme Court of Appeals, however, ordered a $466,260 remittitur of the first punitive damage award. At present, Sheetz is liable to respondent for $2,232,740 in punitive damages.

A. Background

Sheetz is a family-owned business based in Altoona, Pennsylvania. It owns and operates approximately 170 gas station-and-convenience stores in Pennsylvania, Maryland, Virginia, and West Virginia. Sheetz's total net worth at the time of trial was approximately $18.7 million.

Sheetz hired respondent at one of its stores in mid-1989. (9/12/95 Tr. at 75)[1] On January 4, 1991, respondent injured her back while making submarine sandwiches. (9/12/95 Tr. at 80) Respondent worked for another six months, at the conclusion of which time she began receiving temporary total disability benefits from West Virginia's Workers' Compensation Fund. (9/12/95 Tr. at 81)

This case concerns four incidents that occurred after respondent left Sheetz in July 1991. The trial court divided these incidents into two "counts" for jurors, and the state supreme court analyzed separately the respective punitive damage awards in connection with each count.

B. First Count

Respondent alleged three violations of West Virginia law in connection with the first count. These alleged violations consisted of: (1) a conversation between respondent and her manager Karen Foltz in which Ms. Foltz indicated that it was her understanding that Sheetz required workers to be 100% before returning to work; (2) a form letter that Sheetz sent to respondent over one and one-half years after respondent's last day of work informing respondent of a policy that provided for the termination of all employees absent from work for more than one year; and (3) a telephone conversation more than one and one-half additional years later between

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[1] The trial transcript (Tr.) is not consecutively paginated. Accordingly, the transcript date is included in citations.

Trudy Rohrbaugh, a rehabilitation counselor, and Ms. Foltz, in which Ms. Foltz indicated that it was her understanding that respondent could not reapply for employment. The two conversations and one letter constitute all of the relevant communications between Sheetz personnel and respondent before she filed this lawsuit.

The first incident occurred in August 1992 when respondent spoke with store manager Karen Foltz about the possibility of returning to work if her doctor released her to do so.[2] (9/12/95 Tr. at 82-83) Respondent testified as follows about that incident:

Q: Did she tell you whether Sheetz would – was it Sheetz policy to accommodate you in some way?

A: No. She just told me that Sheetz – well, when she had asked me if I was physically able to do the job, I told her no. I had some limitations. And she said, "Well, Sheetz policy is if you are not 100 percent, you can't hold the position."

(9/12/95 Tr. at 83)

The second incident occurred in March 1993 when Sheetz's Human Resources Department mailed respondent a form termination letter. That letter stated in pertinent part: "[A]ny employee of Sheetz, Inc. who is absent from work due to disability (either work related or non-

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[2] The state supreme court's opinion states that respondent testified that she "informed [Karen Foltz] that she was able to come back to work with the permanent limitation of performing no heavy lifting." App. 7. This statement is inaccurate. There was no testimony that respondent told Ms. Foltz that she could return to work or what accommodations she would need. (9/12/95 Tr. at 82-83)

work related) or illness for a total of twelve consecutive or non-consecutive months shall be considered to have resigned his or her employment with Sheetz, Inc." The letter further advised respondent: "If you are able to return to work, please contact the Human Resources Department within one week of receiving this letter. Upon appropriate medical release, you will be eligible for rehire depending on your qualifications and abilities in relation to the job duties and responsibilities." (Plaintiff's Trial Exh. 1) Respondent did not contact anyone at Sheetz after receiving this letter. (9/12/95 Tr. at 87)

The third incident occurred on October 12, 1994, when Trudy Rohrbaugh, a rehabilitation counselor employed by the State of West Virginia, contacted store manager Karen Foltz to inquire about whether respondent could return to work. (9/12/95 Tr. at 149-50) Ms. Foltz told Ms. Rohrbaugh that it was her understanding that respondent could not, but directed Ms. Rohrbaugh to contact Sheetz's corporate offices to confirm whether that understanding was correct. (9/12/95 Tr. at 169) It is undisputed that neither Ms. Rohrbaugh nor respondent contacted Sheetz's corporate offices.

C. Second Count

Respondent filed her first complaint against Sheetz in December 1994. On February 3, 1995, Sheetz made respondent an unconditional offer of reemployment. (9/12/95 Tr. at 116) Respondent returned to work two months later on April 17, 1995. (9/12/95 Tr. at 116)

Store manager Randy Wallen and regional manager Vicki Imler were both present on the day respondent

returned to work. (9/12/95 Tr. at 94) After requesting an updated list of medical restrictions, Vicki Imler asked respondent to stock the store's cooler. (9/12/95 Tr. at 95) Before doing so, respondent was cautioned by Randy Wallen not to lift anything and was told that she could take a break as soon as she finished and her area was cleaned up. (9/12/95 Tr. at 117) According to respondent, stocking the cooler was an integral part of her job. (9/12/95 Tr. at 124) In stocking the cooler, respondent lifted nothing heavier than a six-pack of Pepsi or a two-liter bottle of soda. (9/12/95 Tr. at 119) Respondent worked at this task for twenty minutes until she allegedly experienced spasms in her back. (9/12/95 Tr. at 96, 121) At that time, she stopped. (9/12/95 Tr. at 121) Importantly, respondent did nothing in stocking the cooler that would violate the accommodations that she allegedly needed: a stool for periodic breaks and relief from lifting objects weighing more than 15 pounds on a continuous basis. (9/12/95 Tr. at 133-34)

Although she worked for several more hours, respondent did not complain about her discomfort to either Ms. Imler or Mr. Wallen. (9/12/95 Tr. at 97, 121) After talking with her lawyer, respondent called the store the following day and said that she would not be returning to work. (9/12/95 Tr. at 130; Troup Deposition, Plaintiff's Exh. 4) Respondent filed her amended complaint, adding a claim for retaliatory discharge, in June 1995.

D. Proceedings Below

In connection with the first count, respondent's amended complaint alleged that Sheetz violated the West

Virginia Human Rights Act's disability discrimination provision during the August 1992 and October 1994 conversations and the Workers' Compensation Act's discrimination provision with the March 1993 letter. Sheetz admitted at trial that its March 1993 letter violated the Workers' Compensation Act, and the trial court directed verdicts for respondent in connection with the August 1992 and October 1994 conversations. The jury awarded $1,796,748 in damages. App. 56. The components of that award are as follows:

Economic Damages	$101,748.00
Emotional Distress Damages	$120,000.00
Punitive Damages	$1,575,000.00

In connection with the second count, respondent's amended complaint alleged that Sheetz violated the Human Rights Act's anti-retaliation provisions upon respondent's return to work on April 17, 1995. The jury returned a verdict of $1,202,318. App. 56. The components of that award are as follows:

Economic Damages	$28,318.00[3]
Emotional Distress Damages	$50,000.00
Punitive Damages	$1,124,000.00

In its order denying Sheetz's motion for judgment notwithstanding the verdict and/or for new trial and/or remittitur, the trial court analyzed the punitive damage awards by applying the factors set forth in *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991).[4] App.

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[3] The trial court reduced this award by $6,200.

[4] The *Garnes* factors resemble closely the *Green Oil* factors used by the Alabama Supreme Court in its original analysis of

42. The trial court found that the punitive damage awards bore a reasonable relationship to compensatory damages. App. 51.

On appeal, the state supreme court found the $1,575,000 punitive damage award in connection with the first count excessive and remitted it to $1,108,740, but upheld the $1,124,000 punitive damage award in connection with the second count. App. 35. Justice Maynard dissented. In reaching its conclusion, the majority relied heavily upon its decision in *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W. Va. 1992), *aff'd*, 509 U.S. 443 (1993). The majority also concluded that *BMW* did nothing to alter existing punitive damages law. App. 33-34.

The court first considered the reprehensibility of Sheetz personnel's conduct and the relationship between the punitive damage awards and the harm. The court noted that in *TXO* it had distinguished between "those defendants who d[o] not intentionally or malevolently harm a plaintiff," formerly classified as "really stupid" defendants, and "those defendants who intentionally or malevolently commit[ ] acts they kn[o]w to be harmful," formerly classified as "really mean" defendants.[5] App.

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the punitive damage award in *BMW of North America, Inc. v. Gore*, 646 So. 2d 619 (Ala. 1994), *rev'd*, ___ U.S. ___, 116 S. Ct. 1589 (1996).

[5] The state supreme court has "remove[d] from the lexicon of reviewing the amount of a punitive damage award the terms 'really mean' and 'really stupid,' " while retaining the underlying conceptual framework connoted by those terms. *Alkire v. First National Bank*, 475 S.E.2d 122, 131 (W. Va. 1996).

16-17. The court concluded that the conduct of Sheetz personnel in connection with the first count did not involve intentional or malevolent harm, while their conduct in connection with the second count did. App. 29-30. The court also stated that there were no civil or criminal penalties with which to compare the punitive damage awards in this case and cited Sheetz's failure to settle this case and its financial position as support for the large punitive damage awards. App. 31-33.

The court next addressed Sheetz's argument that the court should alter the way in which punitive damage awards are reviewed in light of *BMW of North America, Inc. v. Gore*, ___ U.S. ___, 116 S. Ct. 1589 (1996). App. 33-34. The court rejected this argument. The court stated: "Other than utilizing the 'guideposts' terminology, *BMW* does not depart from existing law regarding punitive damages." App. 33. According to the court, "the [*BMW*] 'guideposts' were not crafted for the purpose of replacing existing law on punitive damages nor were they intended to be viewed in a limiting fashion, as Sheetz suggests." App. 34. The court went on to say:

> Upon analysis, there is simply no basis for Sheetz' suggestion that *BMW* demands that punitive damages awards be viewed differently from the fashion in which they are currently being reviewed under *Garnes* and its progeny.

App. 34.

Finally, the court explained its decision to reduce the punitive damage award in connection with the first count by $466,260, but not to reduce the award in connection with the second count. The court wrote that Sheetz's

conduct in connection with the first count was reckless, not malicious, thus making the maximum ratio 5 to 1 consistent with syllabus point 15 of its opinion in *TXO*. App. 34-35. The court wrote that Sheetz's conduct in connection with the second count was "sufficiently anal[o]gous to the area of 'fraud, trickery or deceit' recognized by the United States Supreme Court in *TXO* as deserving of larger awards of punitive damages." App. 36. Accordingly, the court held that the 15-to-1 ratio of punitive damages to compensatory damages was not excessive and refused to remit the $1,124,000 punitive damage award.

In his dissenting opinion, Justice Maynard noted not only that this was the first case in which the West Virginia Supreme Court had upheld the awarding of punitive damages in a Human Rights Act case, but also that the decision was inconsistent with prior decisions interpreting the Act, which stated that punitive damages are not recoverable. App. 39-40. Justice Maynard also noted that there was no clear legislative statement that punitive damages are recoverable under the Human Rights Act and Workers' Compensation Act and accordingly concluded that they were not recoverable. App. 40. He also concluded that the punitive damage awards were grossly excessive. App. 40-41.

REASONS FOR GRANTING THE PETITION

The decision of the West Virginia Supreme Court of Appeals in this case is erroneous. Furthermore, with conflicting interpretations of *BMW of North America, Inc. v.*

Gore, ___ U.S. ___, 116 S. Ct. 1589 (1996), proliferating rapidly at both the federal and state levels, this case provides a timely opportunity for this Court to provide much-needed guidance on the application of its principles. Finally, the federal issue presented here is an important one.

A. The State Supreme Court's Decision Is Erroneous

The state supreme court's decision in this case suffers from the same infirmity as did the lower court's decision in *BMW of North America, Inc. v. Gore*, 646 So. 2d 619 (Ala. 1994), *rev'd*, ___ U.S. ___, 116 S. Ct. 1589 (1996). It "applied . . . 'factors' intended to constrain punitive damages awards, in a way that belies that purpose." *BMW*, ___ U.S. ___, 116 S. Ct. at 1606 (Breyer, J., concurring).

In *BMW*, this Court wrote:

> Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty a State may impose.

Id. at ___, 116 S. Ct. at 1598. To assist lower courts in determining whether a penalty is too severe, this Court provided lower courts with a framework, in the form of three guideposts, for reviewing punitive damage awards: (1) the degree of reprehensibility of the conduct; (2) the disparity between the harm or potential harm suffered and the punitive damage award; and (3) the difference between the punitive damage award and the penalty authorized or imposed in comparable cases. *Id.* at ___, 116 S. Ct. at 1598-99.

In analyzing the punitive damage awards in this case, the state supreme court did not apply the *BMW* guideposts, but rather the factors set forth in *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991). The court took the position that *BMW*, and more specifically its guideposts, did nothing to alter West Virginia's punitive damages jurisprudence. In this regard, the court concluded:

> [T]he Supreme Court's own analysis in *BMW* demonstrates by its reference to an expanded concept of "the proper inquiry" necessary to a ratio comparison that the "guideposts" were not crafted for the purpose of replacing existing law on punitive damages *nor were they intended to be viewed in a limiting fashion*, as Sheetz suggests.

App. 34 (emphasis added). The state supreme court's decision in this case illustrates that it used the *Garnes* factors as justifications for, rather than as constraints upon, the punitive damage awards.

The state supreme court's analysis of the punitive damage award in connection with the first count fails to satisfy the mandates of *BMW*. In *BMW*, this Court identified the degree of reprehensibility as "the most important indicium of the reasonableness of a punitive damages award." *BMW*, ___ U.S. at ___, 116 S. Ct. at 1599. In its opinion, the state supreme court conceded that Sheetz's conduct in connection with the first count bore none of the hallmarks of highly reprehensible conduct. App. 34-35. Despite this, the court only remitted the punitive damage award to $1,108,740, exactly five times the compensatory damage award. App. 35; *see* syl. pt. 15, *TXO Production Corp. v. Alliance Resources, Corp.*, 419 S.E.2d 870

(W. Va. 1992), *aff'd*, 509 U.S. 443 (1993). The court made this small reduction despite conceding in other parts of its decision that respondent received temporary total disability benefits until October 11, 1994, and that the evidence introduced regarding respondent's emotional distress, which made up more than one-half of the compensatory damage award, was "meager." App. 36.

Significantly, the state supreme court refused to apply the third *BMW* guidepost – comparable civil or criminal penalties. The court observed that violations of the West Virginia Human Rights Act and Workers' Compensation Act are not punishable with criminal penalties and that noneconomic damage awards are limited to $2,500 (in 1989 dollars) in proceedings before the Human Rights Commission, but refused to view these as limitations in this case. App. 32 n.31. The court also did not consider prior judicial decisions stating that punitive damages are not even available for Human Rights Act violations. *See Harmon v. Higgins*, 426 S.E.2d 344, 346 (W. Va. 1992) ("[P]unitive damages . . . are not an element of damages under the Human Rights Act, *W. Va. Code*, § 5-11-13(c)."); *see also Guevara v. K-Mart Corp.*, 629 F. Supp. 1189, 1190-91 (S.D. W. Va. 1986) (stating that punitive damages are not recoverable under Human Rights Act). The court also observed that Congress has placed a $300,000 cap on compensatory *and* punitive damage awards in Title VII cases, but refused to consider that cap despite consistently holding that the state Human Rights Act should be interpreted in line with federal discrimination law. App. 31-32; *see Hanlon v. Chambers*, 464 S.E.2d 741, 754 (W. Va. 1995) (citing cases). Finally, the court ignored the paucity of employment cases upholding

punitive damage awards remotely comparable to this one, even for highly reprehensible conduct. The state supreme court's apparent conclusion that the third guidepost is irrelevant where there is no statutory cap or criminal penalty effectively makes a nullity of *BMW*'s third guidepost. Using this logic, the third guidepost would have been irrelevant to this Court's decision in *BMW*.

The state supreme court's analysis of the punitive damage award in connection with the second count likewise fails to satisfy the mandates of *BMW*. Most importantly, the state supreme court erroneously concluded that the conduct of Sheetz personnel was sufficiently reprehensible to justify a $1,124,000 punitive damage award. In reaching this conclusion, the court focused on three acts: regional manager Vicki Imler's request that respondent stock the cooler, Vicki Imler's request that respondent provide an updated list of work restrictions, and Sheetz personnel's review of videotape and pictures taken of respondent as she shopped at Sheetz. App. 35-36.

There was nothing inherently reprehensible in Vicki Imler's request that respondent stock a cooler. First, respondent testified that it was an integral part of a Sheetz employee's job. (9/12/95 Tr. at 124) Second, respondent testified that it did not violate any of the accommodations she allegedly needed: a stool for periodic breaks and relief from lifting objects weighing more than 15 pounds on a continuous basis. (9/12/95 Tr. at 119, 121, 133-34)

There likewise was nothing terribly reprehensible about Vicki Imler's request for an updated list of work restrictions or the reviewing of security tape and pictures of respondent as she shopped. Even so, the state supreme court characterized this conduct as "sufficiently anal[o]gous to the area of 'fraud, trickery, or deceit' recognized by the United States Supreme Court in *TXO* as deserving of larger awards of punitive damages." App. 36. As to the former conduct, respondent testified only that Vicki Imler had a "sharp tone," hardly the *sine qua non* of fraud, trickery or deceit. (9/12/95 Tr. at 124) As to the latter conduct, it occurred after respondent left work on April 17 and thus could not possibly have been used to trick or deceive respondent. Sheetz fails to see the analogy between this conduct and fraud, trickery, or deceit.

The conduct of Vicki Imler on April 17, 1995 certainly was not sufficiently reprehensible to justify a 15-to-1 ratio of punitive damages to compensatory damages. The acts of directing respondent to stock a cooler for twenty minutes and requesting an updated list of medical restrictions[6] hardly justify a $1,124,000 punitive damage award or a 15-to-1 ratio of punitive damages to compensatory damages, especially in light of the "meager" evidence of emotional distress. App. 36.

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[6] In its decision, the state supreme court incorrectly states: "Ms. Imler ordered [respondent] to obtain a current medical examination by Friday of the same week, although [respondent] was scheduled to work every day of that week." App. 10. Vicki Imler requested that respondent provide Ms. Imler with an updated list of limitations; she did not direct respondent to have a medical examination. (9/12/95 Tr. at 95; 9/13/95 Tr. at 170)

As a final matter, the state supreme court justified the punitive damage award using factors not identified in *BMW*. In *BMW*, this Court's analysis differed from the Alabama Supreme Court's analysis in that this Court did not consider three factors used by the lower court to justify a $2 million punitive damage award: removal of the defendant's profit, the financial position of the defendant, and the costs of litigation. *See BMW*, ___ U.S. ___, 116 S. Ct. 1589, *rev'g*, 646 So. 2d 619 (Ala. 1994). In this case, the West Virginia Supreme Court of Appeals used similar factors to justify $2,232,740 in punitive damages: Sheetz's failure to settle this case and Sheetz's daily gross revenues.

The state supreme court emphasized Sheetz's failure to settle this case for $30,000 as a justification for the large punitive damage awards. App. 32-33. The court's use of this factor as a justification for $2,232,740 in punitive damages is a classic example of using " 'factors' intended to constrain punitive damages awards, in a way that belies that purpose." *BMW*, ___ U.S. at ___, 116 S. Ct. at 1606 (Breyer, J., concurring). The same holds true for the court's justification of the punitive damage awards based on Sheetz's gross revenues. App. 33 n.33. In *BMW*, this Court observed: "The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice. . . . " *BMW*, ___ U.S. at ___, 116 S. Ct. at 1604. Sheetz, unlike BMW, is not a large corporation. Sheetz's net worth at the time of trial was approximately $18.7 million. The punitive damage awards, as reduced by the state supreme court, represent almost 12% of Sheetz's entire net worth.

Instead of examining sound indicia of Sheetz's financial position like net worth or profits, the state supreme court pointed to gross revenues of approximately $1,500,000 per day, while ignoring corresponding costs. *Cf. Ford Motor Co. v. Sperau*, ___ So. 2d ___, 1997 WL 545878, at *12 (Ala. Sept. 5, 1997) (calling $15 million figure "highly exaggerated" because it referred to gross sales, not profit). This appears to have been what the jury did, as well, after being told on four occasions during closing argument that Sheetz had gross revenues of $1,500,000 per day. (9/14/95 Tr. at 43, 44, 63, 66)

B. The State Supreme Court's Application of Due Process Standards Conflicts in Principle with the Decisions of Virtually All Federal Courts of Appeals and a Significant Number of State Courts of Last Resort

The decision of the West Virginia Supreme Court of Appeals in this case conflicts in principle with the decisions of other federal courts of appeals and state courts of last resort. First, the state supreme court, contrary to virtually all other courts, has refused to modify the way it analyzes punitive damage awards in light of *BMW of North America, Inc. v. Gore*, ___ U.S. ___, 116 S. Ct. 1589 (1996). Second, the court upheld a ratio of punitive damages to compensatory damages that the Tenth Circuit has concluded is presumptively excessive in economic injury cases. Third, the court, unlike other courts analyzing punitive damage awards, improperly dismissed the third *BMW* guidepost – sanctions for comparable conduct. Fourth, the court approved punitive damage awards exceeding 10% of Sheetz's net worth, a percentage that

the Alabama Supreme Court has characterized as crossing the line between punishment and destruction. Fifth, the court upheld punitive damage awards that exceed significantly the size of punitive damage awards upheld or remitted by other courts in employment cases.

First, virtually all courts have modified their analyses of punitive damage awards in light of *BMW*. The West Virginia Supreme Court of Appeals refused to modify its analysis, however, on the ground that *BMW* does not require punitive damage awards to be evaluated differently from the standards enunciated in *Garnes* and *TXO*. App. 33-34. Alabama, whose method of analyzing punitive damage awards most closely resembles West Virginia's, recognized that this was not the case in its decision upon remand. *BMW of North America, Inc. v. Gore*, ___ So. 2d ___, 1997 WL 233910 (Ala. May 9, 1997). In that decision, the court wrote:

> In sum, the United States Supreme Court's *BMW* decision seems to hold that the presumption of validity Alabama extends to a jury verdict must yield to a more meaningful judicial review of that verdict when it is challenged by a tortfeasor as excessive.

Id. at *2; *see also Old Republic Union Insurance Co. v. Tillis Trucking Co., Inc.*, 124 F.3d 1258, 1264 (8th Cir. 1997) ("Indications are that the *BMW* decision has ushered in a new era for punitive damages in Alabama.").

Consistent with the conclusion that *BMW* changes the way punitive damage awards should be evaluated, Alabama has revised its method of analyzing punitive damage awards. Now Alabama courts begin by applying the *BMW* guideposts, and then consider any other *Green*

Oil factors deemed relevant. *See, e.g., American Pioneer Life Insurance Co. v. Williamson*, ___ So. 2d ___, 1997 WL 545880 (Ala. Sept. 5, 1997); *Ford Motor Co. v. Sperau*, ___ So. 2d ___, 1997 WL 545878 (Ala. Sept. 5, 1997); *Life Insurance Co. of Georgia v. Johnson*, ___ So. 2d ___, 1997 WL 465648 (Ala. Aug. 15, 1997); *Union Security Life Insurance Co. v. Crocker*, ___ So. 2d ___, 1997 WL 465647 (Ala. Aug. 15, 1997); *BMW*, ___ So. 2d ___, 1997 WL 233910. The vast majority of other courts apply the *BMW* guideposts almost exclusively, only occasionally considering other factors, to evaluate the constitutionality of punitive damage awards.[7] *See, e.g., FDIC v. Hamilton*, 122 F.3d 854, 861-62 (10th Cir. 1997); *Neibel v. Trans World Assurance Co.*, 108 F.3d 1123, 1131-33 (9th Cir. 1997); *Lee v. Edwards*, 101 F.3d 805, 809-12 (2d Cir. 1996); *Walston v. Monumental Life Insurance Co.*, 923 P.2d 456, 467-68 (Idaho 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 767 (1997); *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 164-66 (Wis. 1997). West Virginia stands in relative isolation in refusing to alter the way it examines punitive damage awards in light of *BMW*. *But see Coffey v. Fayette Tubular Products*, 929 S.W.2d 326, 328-31 (Tenn. 1996).

Second, the Tenth Circuit has concluded that the maximum ratio of punitive damages to compensatory damages in economic injury cases generally is 10 to 1. *Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F.3d

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[7] Consistent with this Court's decision in *Gasperini v. Center for Humanities, Inc.*, ___ U.S. ___, 116 S. Ct. 2211 (1996), many federal courts apply state common law or statutory excessiveness tests before applying the *BMW* guideposts. West Virginia has enunciated no such test.

634, 639 (10th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 1846 (1997); *see also Hamilton*, 122 F.3d at 861. The West Virginia Supreme Court of Appeals upheld a 15-to-1 ratio in connection with the second count. The state supreme court based it decision not to reduce the $1,124,000 punitive damage award on the ground that Sheetz personnel acted with actual evil intention, as defined in *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W. Va. 1992), *aff'd*, 509 U.S. 443 (1993). App. 35-36. According to syllabus point 15 of *TXO*, there is no *per se* constitutional limit in such cases. While this may be true, it does not follow that the maximum ratio is limitless either.

Recognizing that punitive damage awards in economic injury cases are not limitless, the Tenth Circuit has concluded from its review of *BMW* that "in economic injury cases if the damages are significant and the injury not hard to detect, the ratio of punitive damages to the harm generally cannot exceed a ten to one ratio." *Continental Trend Resources*, 101 F.3d at 639. Consistent with that principle, the Tenth Circuit reduced a $30 million punitive damage award in *Continental Trend* to $6 million and a 30-to-1 ratio to 6-to-1. *Id.* at 643. Similarly, the Tenth Circuit reduced a $1.2 million punitive damage award in *Hamilton* to $264,000 and a 27-to-1 ratio to 6-to-1 even while upholding the district court's finding of fraud. *Hamilton*, 122 F.3d at 862. There is nothing so unusual about the conduct in connection with the second count to make a ratio exceeding 10 to 1 appropriate; yet the state supreme court upheld a 15-to-1 ratio.

Third, no other court, besides the Alabama Supreme Court and the West Virginia Supreme Court of Appeals in

this case, appears to have dismissed the third *BMW* guidepost – sanctions for comparable conduct – out-of-hand because of the absence of comparable civil or criminal penalties. In *Hamilton*, for instance, the Tenth Circuit observed that there were no comparable civil or criminal penalties under Oklahoma law for NationsBank's conduct in that case. The court in *Hamilton* wrote:

> This suggests that NationsBank was not on notice that its conduct could give rise to substantial non-compensatory liability. Accordingly, this factor also drives us to conclude that the maximum constitutionally permissible ratio of punitive to actual damages is fairly low in this case.

Hamilton, 122 F.3d at 862; *see also Union Security Life Insurance Co.*, ___ So. 2d at ___, 1997 WL 465647, at *8 (Hooper, J., dissenting) ("The fact that the penalty is meager argues in favor of a reduction in the punitive award."). The West Virginia Supreme Court of Appeals ignored the third guidepost in refusing to consider the absence of comparable civil penalties, criminal penalties, or punitive damage awards.

Fourth, the Alabama Supreme Court has concluded that punitive damage awards that exceed 10% of a defendant's net worth should be examined especially carefully because such awards generally cross the line between punishment and destruction. *BMW*, ___ So. 2d at ___, 1997 WL 233910, at *8; *see Union Security Life Insurance Co.*, ___ So. 2d at ___, 1997 WL 465647, at *6 (reducing award that constituted 8.2% of defendant's net worth where conduct was highly reprehensible, but isolated). In this case, the West Virginia Supreme Court of Appeals upheld punitive

damage awards approximating 12% of Sheetz's net worth. In so doing, the court considered only Sheetz's gross sales. The state supreme court's failure to consider the destructive impact of such a large punitive damage award upon Sheetz illustrates that its analysis was flawed.

Finally, punitive damages in this case exceed significantly punitive damages in other employment cases. In this case, punitive damages currently total $2,232,740. This amount simply is not comparable with awards upheld or remitted by other courts. *See, e.g., Kim v. Nash Finch Co.*, 123 F.3d 1046, 1067 (8th Cir. 1997) (reducing $7 million punitive damage award by jury to $300,000); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 577-78 (8th Cir. 1997) (reducing $50 million punitive damage award by jury to $350,000 where compensatory damages totaled $35,000); *Moreno v. Consolidated Rail Corp.*, 99 F.3d 782, 784 (6th Cir. 1996) (striking $1.3 million punitive damage award for disability discrimination); *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 943 (5th Cir. 1996) (ordering trial court to reduce $150,000 punitive damage award by jury where compensatory damages totaled $22,648); *American Pioneer Life Insurance Co.*, ___ So. 2d at ___, 1997 WL 545880, at *8 (reducing $3,000,000 punitive damage award by jury to $750,000 where compensatory damages totaled $250,000); *Coffey v. Fayette Tubular Products*, 929 S.W.2d 326, 327, 331 (Tenn. 1996) (reducing $1.5 million punitive damage award by jury to $500,000 where compensatory damages totaled $30,000). *But see Wilson v. IBP, Inc.*, 558 N.W.2d 132, 148 (Iowa 1996) (reducing $15 million punitive damage award by jury to $2 million where compensatory damages totaled $4,000), *cert. denied*, ___

U.S. ___, 118 S. Ct. 52 (1997). While the facts of the cases cited above are not directly comparable to the facts in this case, those cases suggest strongly that the West Virginia Supreme Court of Appeals' decision in this case conflicts with the decisions of other courts of appeals and state courts of last resort.

C. The Questions Presented Are Important

The state supreme court's decision in this case directly implicates the Fourteenth Amendment's protection against grossly excessive punitive damage awards. The constitutional questions presented are important because lower courts have expressed confusion about the guidelines for evaluating punitive damage awards set forth in *BMW of North America, Inc. v. Gore*, ___ U.S. ___, 116 S. Ct. 1589 (1996), punitive damage awards by juries are increasing dramatically, and repeated constitutional violations are not only possible, but probable, in states like West Virginia that have resisted reforming the way in which punitive damages are awarded.

The questions presented by this case are important because lower courts have found it difficult to evaluate the constitutionality of punitive damage awards consistent with the dictates of *BMW*. In *Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F.3d 634 (10th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 1846 (1997), for instance, the court wrote:

> We now must determine the maximum constitutionally permissible punitive award based on our review of the record. This obviously is a difficult decision; we must arrive at a precise

> dollar figure by applying guidelines that contain no absolutes to facts that provide only imprecise potential damage amounts.

Id. at 643. In his dissenting opinion in this case, Justice Maynard likewise wrote: "The task of determining what constitutes an excessive punitive damages award, in light of due process guarantees, is extremely difficult." App. 40; *see also FDIC v. Hamilton*, 122 F.3d 854, 861 (10th Cir. 1997) ("The guidelines offered to date by the Supreme Court . . . are somewhat murky."); *Florez v. Delbovo*, 939 F. Supp. 1341, 1348 (N.D. Ill. 1996) (*BMW* "does not give lower courts much guidance on determining the excessiveness of punitive damage awards for 'more reprehensible conduct'" than that in *BMW*.). This case, with its two punitive damage awards for conduct that the state supreme court placed at opposite ends of the reprehensibility continuum, is an ideal vehicle for providing guidance to lower courts.

In addition, this case is emblematic of a recent trend of increasing punitive damage awards that make little sense when contrasted with the reprehensibility of the conduct involved. As the Sixth Circuit noted recently:

> The whole issue of punitive damages is becoming an increasingly problematic one, of course, as a sort of game-show mentality leads some contemporary juries to award punitive damages in amounts that seem utterly capricious.

Moreno v. Consolidated Rail Corp., 99 F.3d 782, 792 (6th Cir. 1996). Not only has there been an "explosion in the frequency and size" of punitive damage awards over the last several decades, *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 61 (1991) (O'Connor, J., dissenting), but

those hardest hit by that explosion have been out-of-state corporations, like Sheetz, perceived by juries to have virtually limitless pockets with which to pay damage awards. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 431 (1994) ("If anything, the rise of large, interstate and multinational corporations has aggravated the problem of arbitrary awards and potentially biased juries.").

Congress, certain state legislatures, and certain courts have made efforts to address this problem. These efforts have included placing caps on punitive damage awards, allocating a certain percentage of punitive damages to state agencies, bifurcating liability and punitive damages determinations, requiring a heightened standard of proof before punitive damages can be awarded, providing more detailed guidance to juries on punitive damages concepts, reinvigorating common-law and rule-based standards for evaluating jury awards, and even providing for judicial assessment of punitive damages. *See, e.g., BMW*, ___ U.S. at ___, 116 S. Ct. at 1618-20 (Ginsburg, J., dissenting) (identifying states adopting or considering adoption of first three reform efforts); *VI. Jury Determination of Punitive Damages*, 110 Harv. L. Rev. 1513, 1526-36 (1997) (discussing recent state reform efforts).

While such efforts may be successful at stemming the tide of capricious punitive damage awards in states that have adopted them, they provide no protection for defendants in states, like West Virginia, that have not. For defendants in such states, the review required by the Due Process Clause of the Fourteenth Amendment provides the only significant protection against grossly excessive

punitive damage awards. Constitutional violations, especially in the absence of adequate safeguards against their frequent repetition, implicate the legitimate powers of this forum.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

January 1997 Term

No. 23463

CHERYL L. VANDEVENDER,
Plaintiff Below, Appellee,

v.

SHEETZ, INC., A PENNSYLVANIA CORPORATION,
Defendant Below, Appellant

KAREN FOLTZ,
Defendant Below, Appellee

Appeal from the Circuit Court of Berkeley County
Honorable Thomas W. Steptoe, Jr., Judge
Civil Action No. 94-C-653

REVERSED, IN PART, AND REMANDED

Submitted: February 4, 1997
Filed: July 11, 1997

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The Opinion of the Court was delivered PER CURIAM. JUSTICE MAYNARD dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. "Punitive damages must bear a reasonable relationship to the potential of harm caused by the defendant's actions." Syl. Pt. 1, in part, *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991).

2. "Under our system for an award and review of punitive damages awards, there must be: (1) a reasonable constraint on jury discretion; (2) a meaningful and adequate review by the trial court using well-established principles; and (3) a meaningful and adequate appellate review, which may occur when an application is made for an appeal." Syl. Pt. 2, *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991).

3. "When the trial court instructs the jury on punitive damages, the court should, at a minimum, carefully explain the factors to be considered in awarding punitive damages. These factors are as follows:

> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.
>
> (2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to

the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/ how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.

(3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.

(4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.

(5) The financial position of the defendant is relevant."

Syl. Pt. 3, *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991).

4. "When the trial court reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following additional factors:

(1) The costs of the litigation;

(2) Any criminal sanctions imposed on the defendant for his conduct;

> (3) Any other civil actions against the same defendant, based on the same conduct; and
>
> (4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff."

Syl. Pt. 4, in part, *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991).

5. "Upon petition, this Court will review all punitive damage awards. In our review of the petition, we will consider the same factors that we require the jury and trial judge to consider, and all petitions must address each and every factor set forth in Syllabus Points 3 and 4 of this case with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage. Assignments of error related to a factor not specifically addressed in the petition will be deemed waived as a matter of state law." Syl. Pt. 5, *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991).

6. "The outer limit of the ratio of punitive damages to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1. However, when the defendant has acted with actual evil intention, much higher ratios are not *per se* unconstitutional." Syl. Pt. 15, *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992), *aff'd*, 509 U.S. 443 (1993).

7. "Under our punitive damage jurisprudence, it is imperative that the amount of the punitive damage award be reviewed in the first instance by the trial court by applying the model specified in Syllabus Points 3 and 4 of *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991), and Syllabus Point 15 of *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992), *aff'd*, 509 U.S. 443, 113 S. Ct. 2711, 125 L.Ed.2d 366 (1993). Thereafter, and upon petition, this Court will review the amount of the punitive damage award, applying the standard specified in Syllabus Point 5 of *Garnes*." Syl. Pt. 5, *Alkire v. First Nat'l Bank*, 197 W. Va. 122, 475 S.E.2d 122 (1996).

8. "Every post-trial analysis as to the amount of the punitive damage award should be conducted by the trial court exclusively within the boundaries of Syllabus Points 3 and 4 of *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991), and Syllabus Point 15 of *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992) [*aff'd*, 509 U.S. 443 (1993)]. We remove from the lexicon of reviewing the amount of a punitive damage award the terms 'really mean' and 'really stupid,' as they were applied in *TXO*." Syl. Pt. 6, *Alkire v. First Nat'l Bank*, 197 W. Va. 122, 475 S.E.2d 122 (1996).

9. "Our punitive damage jurisprudence includes a two-step paradigm: first, a determination of whether the conduct of an actor toward another person entitles that person to *a* punitive damage award under *Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895); second, if a punitive damage award is justified, then a review is mandated to determine if *the* punitive damage award is excessive

under *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991)." Syl. Pt. 7, *Alkire v. First Nat'l Bank*, 197 W. Va. 122, 475 S.E.2d 122 (1996).

10. "This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance." Syl. Pt. 2, *Sands v. Security Trust Co.*, 143 W. Va. 522, 102 S.E.2d 733 (1958).

11. " 'In actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it, the jury may assess exemplary, punitive, or vindictive damages; these terms being synonymous.' Syllabus Point 4, *Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895)." Syl. Pt. 4, *Alkire v. First Nat'l Bank*, 197 W. Va. 122, 475 S.E.2d 122 (1996).

Per Curiam:

Through this appeal, Appellee Sheetz, Inc. ("Sheetz") challenges the verdict awarded to Appellee Cheryl Vandevender in a wrongful discharge case on grounds of unconstitutionally excessive punitive damages. After reviewing the record of this case, we determine that the punitive damages awarded in connection with the theories of unlawful termination and refusal to permit Appellee to apply for rehire or return to work were excessive under our prior holdings. However, we uphold the punitive damages awarded in connection with the theory of retaliation.

I. FACTUAL AND PROCEDURAL BACKGROUND

Ms. Vandevender was hired as a salesperson by Sheetz for employ in one of its convenience stores on June 8, 1989. Within six months, she was promoted to second assistant manager. While at work on January 4, 1991, Appellee suffered a back injury.[1] She first saw a physician in connection with this back injury on January 21, 1991.[2] Despite her injury, she continued to work for a number of months. Ms. Vandevender began receiving temporary total disability ("TTD") benefits on July 30, 1991, in connection with the back injury she sustained while employed at Sheetz. She underwent back surgery on October 7, 1991.

In either August or October of 1992[3] Appellee met with Sheetz' store manager Karen Foltz and informed her that she was able to come back to work with the permanent limitation of performing no heavy lifting. Ms. Foltz told Appellee that she could not return to work, pursuant to company policy, unless she was "100%." Because Sheetz would not allow her to return to work with restrictions, Appellee's physician continued to certify her as TTD.

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[1] At the time of the injury, Appellee was making sandwiches and apparently suffered the injury while trying to remove the lid from a large pickle jar.

[2] Prior to her employment with Sheetz, Ms. Vandevender had injured her back and undergone surgery for the injury.

[3] Whereas Appellee testified that this meeting occurred in August, the circuit court, in its order denying Appellant's motion for judgment notwithstanding the verdict, states that this meeting happened in October of 1992.

Sheetz sent Appellee a letter on March 15, 1993, stating its policy that a twelve-month absence from work is treated as a resignation.[4] The correspondence indicated that if Appellee was able to work, she should contact the company's human resource department within one week of her receipt of the letter and that she would be eligible for rehire upon appropriate medical release subject to her qualifications and abilities in relation to the job duties and responsibilities. Appellee did not contact either Sheetz' human resource department or her store manager following her receipt of this letter. In accordance with its company policy regarding a one-year absence, Sheetz fired Appellee in March 1993.

Appellee was examined by a workers' compensation physician on June 19, 1994, and determined to have reached her maximum degree of medical improvement, according to the June 28, 1994, report of Dr. Siad. As a result of this medical determination, Appellee's TTD benefits were terminated on October 11, 1994.

On October 12, 1994, Trudy Rohrbaugh, a West Virginia Rehabilitation Counselor, called Ms. Foltz to inquire about Appellee returning to work. While Ms. Foltz reportedly told Ms. Rohrbaugh that it was her understanding that it would be futile for Appellee to apply for rehire,

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[4] The actual wording of the letter concerning this policy was that " '[a]ny employee of Sheetz, Inc. who is absent from work due to disability (either work related or non-work related) or illness for a total of twelve (12) consecutive or non-consecutive months shall be considered to have resigned his or her employment with Sheetz, Inc.' " At trial, Sheetz admitted that this letter violated the anti-discrimination provisions of West Virginia Code § 23-5A-3(a) (1994).

she did instruct the rehabilitation counselor to call Sheetz' corporate office concerning the company's reemployment policy. It is undisputed that neither Appellee nor Ms. Rohrbaugh called Sheetz' corporate office to inquire regarding Sheetz' policy.

On December 1, 1994, Appellee filed a civil action against Sheetz for refusing to rehire an employee discharged following a work-related injury in violation of the anti-discrimination provisions of the West Virginia Workers' Compensation Act ("Workers' Compensation Act")[5] and for refusing to consider a prior employee for rehire based on an actual or perceived handicap in violation of the West Virginia Human Rights Act ("Human Rights Act").[6] During the discovery phase of the litigation, Ms. Foltz testified that Appellee could have been accommodated since the job functions listed by Sheetz requiring employees to lift up to fifty pounds and to stand for eight hours a day were not actually essential.[7] In response to this deposition testimony, Appellee demanded to be returned to her job.

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[5] *See* W. Va. Code §§ 23-5A-1 to -3 (1994).

[6] *See* W. Va. Code §§ 5-11-1 to -19 (1994 & Supp.1996).

[7] Ms. Foltz was fired five weeks after her deposition. The trial court, upon objection of Sheetz' counsel on grounds of relevancy, refused to permit Appellee's counsel to inquire into the basis for her firing. The trial court employed the balancing test required by Rule 403 of the Rules of Evidence and determined that "any probative value involved in this evidence would be substantially outweighed by unfair prejudice."

Sheetz offered to hire Appellee as a sales clerk on February 3, 1995.[8] She returned to work at Sheetz on April 17, 1995. The regional manager, Ms. Imler, was present on the date of Appellee's return to work, and requested that Appellee provide her with a list of work restrictions. Ms. Imler demanded to see written restrictions despite the fact that Sheetz had required Appellee to undergo an independent medical examination one month prior to her return to work and despite the fact that Ms. Imler and Sheetz' district manager, Ms. Anslinger, had specifically discussed the results of Appellee's medical examination. Ms. Imler took the position that until she received an updated doctor's slip, she did not "see" any physical restrictions.[9] Ms. Imler ordered her to obtain a current medical examination by Friday of the same week, although Appellee was scheduled to work every day that week. Pursuant to Ms. Imler's directive,[10] Appellee began to stock the cooler, but had to stop after only twenty minutes of performing this task because of back spasms.[11] Appellee continued to work for several more hours, but did not inform anyone at the store

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[8] Apparently, the position of assistant manager no longer existed due to restructuring.

[9] Appellee's work restrictions were that she could only lift fifteen pounds at a time and she had to use a stool for periodic standing breaks.

[10] Randy Wallen, the store manager, cautioned Appellee not to lift anything and told her that she could take a break after she finished her job and cleaned up the area.

[11] The record indicates that Appellee did not lift anything heavier than a six-pack of Pepsi or a two-liter bottle of soda while stocking the cooler.

regarding her back pains. She called the next morning and said she would not be returning to work on the advice of her attorney.

In June 1995, Appellee amended her complaint to allege that Sheetz failed to accommodate her during the period of 1991 to 1995 in violation of the Human Rights Act and that Ms. Imler's request that she stock the cooler on April 17, 1995, constituted an unlawful reprisal in violation of the Human Rights Act. *See* W. Va. Code § 5-11-9(7)(C). A three-day jury trial in September 1995 resulted in a favorable verdict for Appellee. She was awarded $130,066 in compensatory damages, $170,000 for noneconomic damages,[12] and $2,699,000 in punitive damages. Appellant filed motions for judgment notwithstanding the verdict or in the alternative, a new trial or remittitur. This appeal arises from the circuit court's denial of those motions.[13]

II. DISCUSSION

A. Federal Law

Sheetz asserts that under the standards set forth by the United States Supreme Court in *BMW of North America, Inc. v. Gore*, ___ U.S. ___, 116 S.Ct. 1589 (1996), the punitive damages award was grossly excessive in violation of Sheetz' due process rights. Sheetz also maintains

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[12] These damages were awarded for "emotional distress, upset, embarrassment, and humiliation."

[13] The circuit court did grant Appellant's motion for remittitur with regard to $6,200 of the $13,200 the jury awarded for medical expenses on the grounds that "[n]o evidence was presented which would justify such an award."

that the circuit court failed to conduct a "meaningful and adequate review" of the punitive damages award as required by *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991).

As the United States Supreme Court articulated in *BMW*, "[t]he Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a " ' "grossly excessive" ' " punishment on a tortfeasor." ___ U.S. at ___, 186 S.Ct. at 1592 (quoting *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454 (1993)). In *BMW*, the plaintiff brought suit against the automobile manufacturer for failing to disclose that the vehicle he purchased had been repainted following damage to the car's body. ___ U.S. at ___, 116 S.Ct. at 1593. The Georgia [sic] jury awarded $4,000 in compensatory damages and $4,000,000 in punitive damages. Despite the state supreme court's remittitur of the punitive damages award to $2,000,000, the United States Supreme Court determined that the award was grossly excessive in violation of the Due Process Clause. *Id.* at ___, 116 S.Ct. at 1604.

Stressing the totally economic nature of the compensatory damages awarded in *BMW*, the Supreme Court identified three guideposts for use in examining the companion Due Process Clause concerns of fair notice of the type of conduct that will subject a defendant to punishment and fair notice of the severity of the penalty that may be imposed for such conduct. These "guideposts" are: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of punitive damages to the actual harm inflicted on the plaintiff; and (3) a comparison of the punitive damages award with the civil or criminal

penalties that could be imposed for comparable misconduct. ___ U.S. at ___, 116 S.Ct. at 1598-1603. Appellant suggests that a modification or refinement of this Court's holding in *Garnes* is required based on the Supreme Court's pronouncement of these three "guideposts." *See* 186 W. Va. at 667-69, 413 S.E.2d at 908-10.

The Due Process Clause issue raised by Appellant involves the procedural concern of whether Sheetz received adequate notice of the severity of the penalty imposed by the award. As noted in *BMW*, our system of jurisprudence includes the axiom that "a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose." ___ U.S. at ___, 116 S.Ct. at 1598 n.22 (observing that "strict constitutional safeguards afforded to criminal defendants are not applicable to civil cases, but the basic protections against 'judgments without notice' afforded by the Due Process Clause is implicated by civil *penalties*") *(quoting Shaffer v. Heitner,* 433 U.S. 186, 217 (1977)).

B. State Law

Recent developments concerning the area of punitive damages began with this Court's pronouncement in syllabus point one of *Garnes* that "[p]unitive damages must bear a reasonable relationship to the potential of harm caused by the defendant's actions." Syl. Pt. 1, in part, 186 W. Va. at 658, 413 S.E.2d at 899. Through that decision we imposed the necessary, but previously lacking, requirement of "a meaningful and adequate review" by both the trial and appellate court systems, announcing that

> Under our system for an award and review of punitive damage awards, there must be: (1) a reasonable constraint on jury discretion; (2) a meaningful and adequate review by the trial court using well-established principles; and (3) a meaningful and adequate appellate review, which may occur when an application is made for an appeal.

Id. at syl. pt. 2.

As a necessary corollary to the review requirements imposed by *Garnes*, we provided trial courts with the following instructions regarding what factors they should advise juries to consider in making punitive damages awards:

> When the trial court instructs the jury on punitive damages, the court should, at a minimum, carefully explain the factors to be considered in awarding punitive damages. These factors are as follows:
>
> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.
>
> (2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions

were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/ how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.

(3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.

(4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.

(5) The financial position of the defendant is relevant.

Syl. Pt. 3, *Garnes*, 186 W. Va. at 658, 413 S.E.2d at 899-900.

Following the return of a punitive damages award, *Garnes* requires the trial court to make a "meaningful and adequate review" of the award.

When the trial court reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following additional factors:

(1) The costs of the litigation;

(2) Any criminal sanctions imposed on the defendant for his conduct;

(3) Any other civil actions against the same defendant, based on the same conduct; and

> (4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.

Syl. Pt. 4, in part, *Garnes*, 186 W. Va. at 659, 413 S.E.2d at 900.

With regard to *this* Court's review of punitive damages awards, we stated in syllabus point five of *Garnes* that:

> Upon petition, this Court will review all punitive damage awards. In our review of the petition, we will consider the same factors that we require the jury and trial judge to consider, and all petitions must address each and every factor set forth in Syllabus Points 3 and 4 of this case with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage. Assignments of error related to a factor not specifically addressed in the petition will be deemed waived as a matter of state law.

186 W. Va. at 659, 413 S.E.2d at 900.

Following *Garnes*, we next addressed the subject of punitive damages awards in *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992), *aff'd*, 509 U.S. 443 (1993). That decision, while applying the *Garnes* factors, made a distinction between those defendants who did not intentionally or malevolently harm a plaintiff and those defendants who intentionally

or malevolently committed acts they knew to be harmful.[14] With regard to those defendants who had no actual intention to commit harm, we held in syllabus point fifteen of *TXO* that

> The outer limit of the ratio of punitive damages to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1. However, when the defendant has acted with actual evil intention, much higher ratios are not *per se* unconstitutional.

187 W. Va. at 461, 419 S.E.2d at 874.

Most recently, we exhorted in *Alkire v. First National Bank*, 197 W. Va. 122, 475 S.E.2d 122 (1996), that:

> Under our punitive damage jurisprudence, it is imperative that the amount of the punitive damage award be reviewed in the first instance by the trial court by applying the model specified in Syllabus Points 3 and 4 of *Garnes v.*

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[14] These categories were previously identified under the nomenclature of "really stupid" defendants and "really mean" defendants, respectively. In syllabus point six of *Alkire v. First National Bank*, 197 W. Va. 122, 475 S.E.2d 122 (1996), "[w]e remove[d] from the lexicon of reviewing the amount of a punitive damage award the terms 'really mean' and 'really stupid' as they were applied in *TXO*." In affirming our *TXO* decision, the United States Supreme Court observed that these two "terms played little, if any, part in its [the West Virginia Supreme Court of Appeals'] actual evaluation of the propriety of the damages award [a]s eviden[ced] from the reasoning in its thorough opinion. . . . " 509 U.S. at 465.

> *Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991), and Syllabus Point 15 of *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992), *aff'd*, 509 U.S. 443, 113 S. Ct. 2711, 125 L.Ed.2d 366 (1993). Thereafter, and upon petition, this Court will review the amount of the punitive damage award, applying the standard specified in Syllabus Point 5 of *Garnes*.

Syl. Pt. 5, 197 W. Va. at 124-25, 475 S.E.2d at 124-125. We further stated that:

> Every post-trial analysis as to the amount of the punitive damage award should be conducted by the trial court exclusively within the boundaries of Syllabus Points 3 and 4 of *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991), and Syllabus Point 15 of *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992)[*,aff'd*, 509 U.S. 443 (1993)]. We remove from the lexicon of reviewing the amount of a punitive damage award the terms "really mean" and "really stupid," as they were applied in *TXO*.

Syl. Pt. 6, 197 W. Va. at 125, 475 S.E.2d at 125.

In syllabus point seven of *Alkire*, we identified the model under which punitive damage awards are reviewed:

> Our punitive damage jurisprudence includes a two-step paradigm: first, a determination of whether the conduct of an actor toward another person entitles that person to *a* punitive damage award under *Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895); second, if a punitive damage award is justified, then a review is

> mandated to determine if *the* punitive damage award is excessive under *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991).

197 W. Va. at 125, 475 S.E.2d at 125.

Under this two-stage model, we first examine whether a punitive damage award was permitted for the conduct of Sheetz toward Appellee. *See id.* In her original complaint, Appellee asserted two theories against Sheetz, both predicated on the company's failure to rehire her following discharge subsequent to a work-related injury. In her amended complaint, she included theories of liability for Sheetz' alleged failure to accommodate her physical limitations and for committing an unlawful reprisal in retaliation for Appellee's filing of a workers' compensation claim. Appellee's theories of recovery in both her original complaint and the amended complaint were expressly pled as violations of the Human Rights Act and the Workers' Compensation Act.

Sheetz argues on appeal that punitive damages are not recoverable for violations of the anti-discrimination provisions of the Workers' Compensation Act or the Human Rights Act. Appellee argues,[15] and Sheetz admits,

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[15] Appellee notes in its brief that "[t]his Court will find no affirmative constitutional defense in the pleadings, no dispositive motion, no motion in limine, no objection, no reference in its pre-trial memorandum, no reference in its post-trial motion, no reference in appellant's petition to this Court, and no reference anywhere in the record, opposing an award of punitive damages on the basis that such an award is not available as a matter of law."

that it failed to raise this substantive objection below.[16] Our review of the record confirms a failure to preserve this issue for appeal.[17] As we held in syllabus point two of *Sands v. Security Trust Co.*, 143 W. Va. 522, 102 S.E.2d 733 (1958), "[t]his Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance." Accordingly, we decline to address this issue for the first time on appeal.

1. Did Sheetz' conduct permit an award of punitive damages?

In *Alkire*, we revisited the types of conduct that give rise to punitive damages with reference to syllabus point four of *Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895):

> 'In actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it, the

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[16] In its reply brief, Sheetz acknowledges that appellate counsel raised the precise issue of the recoverability of punitive damages under the Human Rights Act and the Workers' Compensation Act "for the first time in its initial brief" to this Court.

[17] Although Sheetz filed a motion in limine with regard to punitive damages, the basis for such motion was the lack of any evidence of willful, wanton, reckless, or malicious conduct on the part of Sheetz that would permit punitive damages to be awarded by law. Similarly, Sheetz' only objection at trial to punitive damages was on grounds of insufficient evidence of a prima facie punitive damages case to permit the jury's consideration of defendant's financial information.

> jury may assess exemplary, punitive, or vindictive damages; these terms being synonymous.'

197 W. Va. at 129, 475 S.E.2d at 129 (quoting *Mayer*, 40 W. Va. at 247, 22 S.E. at 58). Evidence of Sheetz' conduct cited by Appellee that entitles her to a punitive damages award includes Sheetz' admission of violating this state's public policy to return injured workers to the workplace as quickly as possible. *See* W. Va. Code § 23-4-7(a) (Supp. 1996). Sheetz also admitted in its opening statement that its company policy not to permit injured employees to return to work until they are "100%" was in violation of state law.[18] *See* W. Va. Code § 23-5A-3(b) (1994).[19] Appellee further cites Sheetz' admission that it could have accommodated Appellee's physical limitations and permitted her to return to work early into this matter as violative of state law.[20] *See* W. Va. Code § 5-11-9 (1994). Only when she made a demand to return to work, following Ms. Foltz' deposition, was Appellee permitted to return to work.

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[18] According to Sheetz, this policy is no longer in effect.

[19] That section states, in pertinent part, that:

> It shall be a discriminatory practice within the meaning of section one of this article [W. Va. Code § 23-5A-1] for an employer to fail to reinstate an employee who has sustained a compensable injury to the employee's former position of employment upon demand for such reinstatement provided that the position is available and the employee is not disabled from performing the duties of such position.

W. Va. Code § 23-5A-3(b).

[20] In its opening statement, Sheetz stated "they probably ought to have hired her on October 12[, 1994] when Trudy Rohrbaugh called."

Additional evidence of improper conduct involves Sheetz' failure to pay even one penny of Appellee's medical expenses as of November 1995, despite its stipulation to $7,000 in medical expenses. Similarly offensive, as the trial court observed in its order denying Sheetz' motion for judgment notwithstanding the verdict, was Sheetz' complete failure to engage in settlement negotiations.[21]

Further factual evidence of Sheetz' improper conduct toward Appellee included the regional manager's feigning ignorance regarding knowledge of any physical limitations when she returned to work. Ms. Anslinger testified that she told Ms. Imler that Appellee was not to do any bending, lifting or twisting. Yet, when Appellee returned to work, Ms. Imler took the position that "until I see . . . [an updated physician's statement], you're just like one of the others." This deceitful tack was further exacerbated by Ms. Imler's demand that Appellee have a current medical examination completed by the end of the work week, in spite of the fact that Appellee was scheduled to work every day that week.

The jury also heard evidence of surveillance efforts that Sheetz undertook in connection with both Appellee's return to work and her later visits to the store. The day after Appellee returned to work, Ms. Imler returned to the store to retrieve the tape that was made of Appellee the day before. The trial court notes, in its order, that various sales clerks began taking pictures of Appellee

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[21] Appellee had offered to settle the case for $30,000 plus her job back during the early stages of this litigation. The trial court notes that Sheetz "never offered a single cent to settle this case."

when she shopped at Sheetz' store and that these pictures all made their way to Ms. Anslinger's office at corporate headquarters. The trial court further observed that "[n]o one accepted responsibility at trial for this surveillance."

Given Sheetz' admissions of discriminatory acts that constitute violations of both state law and public policy,[22] we conclude that sufficient evidence was presented of willful, wanton, and/or reckless conduct that warranted a consideration of punitive damages by the jury. In addition to the discriminatory conduct which Sheetz admitted, the record is replete with further examples of conduct justifying an award of punitive damages, not the least of which was Sheetz' willful denial of knowledge of Appellee's medical restrictions.

2. Meaningful and Adequate Review

The trial court's understanding of its review obligations under *Garnes* is apparent from the order denying Sheetz' motion for judgment notwithstanding the verdict:

> The Court . . . has considered the evidence adduced at trial and has: reviewed whether the punitive damages awarded bear a reasonable relationship to the harm that is likely to occur from Sheetz, Inc.'s conduct as well as the harm that has actually occurred; reviewed the reprehensibility of Sheetz, Inc.'s conduct; considered

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[22] Sheetz admits that its "personnel erroneously adopted two policies that were in violation of West Virginia law: an unwritten policy that required all workers to be 100% before returning to work and a written policy that led to the discharge of employees absent for more than one year."

> whether Sheetz, Inc. profited from its wrongful conduct; considered Sheetz, Inc.'s financial position; considered the costs of litigation, the lack of any criminal sanction, the absence of other civil actions based upon the same conduct, the appropriateness of punitive damages to encourage fair and reasonable settlement once the fact that a clear wrong was committed is apparent, and, as a matter of fundamental fairness, whether the punitive damages awarded bear a reasonable relationship to the compensatory damages awarded.

In reviewing the facts of the case against these standards, the trial court opined:

> Sheetz, Inc. continued upon its illegal course of conduct for a period of nearly five years. Such acts included refusing to accommodate plaintiff's work restrictions, refusing to reinstate plaintiff after suffering a compensable workplace injury, discharging plaintiff from employment, refusing to rehire plaintiff, and refusing to allow plaintiff to even apply for reemployment. Other illegal acts that justify a substantial award of punitive damages include retaliating against a manager who testified during a deposition contrary to Sheetz, Inc.'s position, and retaliating against plaintiff upon her negotiated return to work by requiring her to perform work activities which defendant's managers knew she could not perform without risking re-aggravating her injuries or causing new injury.
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> The Court further finds that Sheetz, Inc., by policy and practice, has attempted to evade its responsibilities to workers injured in the line of

> duty by discharging them and refusing, in derogation of our laws, to re-employ such injured workers. Such policies and practices have the effect of increasing Sheetz, Inc.'s profits at the expense of honest competitors, other honest employers and their employees, and to the detriment of the citizens of this State. The Court notes that most, if not all of the operative facts in this case, took place after the passage of the Americans with Disabilities Act, an Act that has been the subject of considerable public discussion and awareness. It is simply not credible for Sheetz, Inc. to claim, as it attempted to do in argument, that it made "mistakes." Indeed, Sheetz, Inc. paid bonuses to managers based on their ability to reduce Workers' Compensation premiums, thus encouraging conduct that violates State public policy.
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> . . . .
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> Moreover, the Court finds that the punitive damages awarded bear a reasonable relationship to the compensatory damages due in considerable part, to the affirmative, retaliatory conduct of Sheetz, Inc. in refusing to accommodate plaintiff, discharging her, refusing to allow her to reapply for employment, and in retaliating against her when she was finally returned to work.

Our review of the record reveals that the trial court properly engaged in the review process required by this Court in *Garnes* for awards of punitive damages. *See* 186 W. Va. at 667-69, 413 S.E.2d at 908-10. Accordingly, we reject Sheetz' contention that it was denied a "meaningful and adequate" review of the punitive damages award. *Id.*

3. Excessiveness of the Punitive Damage Award

Returning to the crux of this appeal, we must now examine whether the punitive damages award was excessive. Sheetz states its assignments of error rather conclusorily, and certainly not within the directive of syllabus point five of *Garnes* that requires a petitioner to address "with particularity" the factors set forth in syllabus points three and four of that decision and to "summariz[e] the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage." 186 W. Va. at 659, 413 S.E.2d at 900. Sheetz argues that the punitive damages awarded do not bear a reasonable relationship to the harm that is likely to occur or that has actually occurred. *See id.* at 658, 413 S.E.2d at 899, syl. pt. 3. Rather than summarizing the evidence presented on this issue at trial or post-trial, however, Sheetz merely offers its version of Appellee's harm as the loss of four months' wages from the date when her doctor released her to come to work on October 12, 1994,[23] until February 3, 1995, when it offered to reemploy her. Sheetz asserts that besides this minor period of lost wages, Appellee's only other loss "as a result of any claimed culpable conduct on the part of Sheetz was that she spent twenty minutes in the cooler on April 17, 1995." Observing that

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[23] Appellee's physician, Dr. Siad testified that the only reason he did not release Appellee at an earlier time was because of his understanding that Sheetz would not rehire her unless she was "100%." Also introduced at trial was a July 1994 letter from Dr. Siad to Sheetz indicating that Appellee's physical limitations would not prevent her from working if reasonable accommodations were made.

the jury awarded Appellee nearly $125,000 for past and future wages, medical expenses, and educational expenses,[24] Sheetz calculates the ratio of punitives to compensatory damages as nearly 23 to one[25] and concludes that this is necessarily excessive. We do not find the harm suffered by Appellee to be as nominal as Sheetz suggests, nor do our calculations[26] of punitives to compensatories result in the high ratio claimed by Appellee.

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[24] Although the jury awarded Appellee $130,066 in economic damages, the trial court remitted that amount by $6,200 after concluding that the $13,200 awarded by the jury for medical expenses was not supported by the evidence. Following the remittitur, the award of economic damages would have been $123,866.

[25] In its petition, Sheetz notes that it included the $170,000 awarded to Appellee for noneconomic damages as part of the punitive damages award on the grounds that "damages for emotional distress without proof of physical trauma are essentially punitive damages. . . . " As support for this proposition, Sheetz cites *Harless v. First National Bank*, 169 W. Va. 673, 289 S.E.2d 692 (1982). While that decision discusses how a jury award of emotional distress damages where no physical trauma exists can be likened to that of a punitive damages award in that the jury may have assessed defendant's conduct in making the award, *Harless* clearly categorizes emotional distress damages as compensatory in stating that "[t]he recovery for emotional distress *as well as other compensatory damages* such as lost wages should adequately compensate the plaintiff." *Id.* at 690-92, 289 S.E.2d at 702-03 (emphasis supplied).

[26] For reasons discussed *infra*, we view separately, as did the jury, the damages awarded for the unlawful termination and failure to rehire from the retaliatory damages. For the former theories, the jury awarded $221,748 in compensatories (including emotional distress) and $1,575,000 in punitives. The ratio of punitives to compensatories on those claims amounts to

At the core of any appellate review of punitive damages is the concern that "the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Pacific Mut. Life Insur. Co. v. Haslip*, 499 U.S. 1, 21 (1991). While the impossibility of crafting a mathematically precise bright line for purposes of examining punitive damages awards is well-accepted, the admittedly inexact alternative has been to view the award against a host of factors intended to assure that "the discretion [with which punitive damages are awarded] is exercised within reasonable constraints, [and] due process is satisfied." *Id.* at 20. In this State, those factors are referred to as the *Garnes* factors.[27]

The first factor set forth in *Garnes* requires that "[p]unitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred." Syl. Pt. 3, in part, *Garnes*, 186 W. Va. at 658, 413 S.E.2d at 899. Inherent to this inquiry is the notion that the amount of the damages awarded are directly connected to the nature of the defendant's conduct – the more egregious the conduct of the defendant, the greater the award. *See BMW*, ___ U.S. at ___, 116 S.Ct. at 1599

7:1. For the retaliation claim, the jury award of compensatories following remittitur was $72,118 and $1,124,000 in punitives. The ratio for this theory is 15:1.

[27] The *Garnes* factors were derived in part from the factors used by the Alabama state court in *Haslip*. *See* 509 U.S. at 21-22 (discussing criteria used by Alabama Supreme Court to determine excessiveness of punitive damages award); *see generally Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala.1989).

(noting that reasonableness requirement of punitive damages award is premised on "the accepted view that some wrongs are more blameworthy than others"). Whereas this Court previously created a distinction between really mean and really stupid conduct, we now view the defendant's conduct in terms of traditional concepts long associated with punitive damage awards. *See TXO*, 187 W. Va. at 474-76, 419 S.E.2d at 887-89; *Alkire*, 197 W. Va. at 131, 475 S.E.2d at 131, and syl. pt. 6.

In syllabus point fifteen of *TXO* we distinguished between conduct that demonstrates "extreme negligence or wanton disregard" and conduct that evinces an "actual intention to cause harm." 187 W. Va. at 461, 419 S.E.2d at 874. The significance of that distinction was our formulation of an outer limit of five to one with regard to the ratio of punitives to compensatory damages in cases that fall into the first category – that is, those cases in which the defendant's conduct registers on the scale of extreme negligence or wanton disregard. *Id.* Only in those cases where the defendant can be shown to have actually intended to cause harm is the ratio of punitives to compensatories permitted to climb higher without "rais[ing] a suspicious judicial eyebrow." *TXO*, 509 U.S. at 481 (O'Connor, J., dissenting). The type of evidence presented against Sheetz in this case with regard to the unlawful termination/failure to hire claims suggests an employer who clearly acted in contravention of state law and policies, but not an employer whose conduct indicates a malicious intent to prevent Appellee from returning to its employ. Simply put, bad or legally incorrect corporate policy is not the equivalent of a mean-spirited, evil intent

to cause harm. Conversely, the evidence adduced in connection with the retaliation theory – Sheetz' acts upon Appellee's return to work – fall into a different category. The acts of Ms. Imler in willfully pretending to be unaware of any work restrictions when Appellee returned to work, directing her to get yet another doctor's examination by the end of the work week, directing Appellee to engage in strenuous physical work right off the bat, as well as Sheetz' surveillance of Appellee during both her return to work and on subsequent visits to the store suggest a mean-spirited intent to punish Appellee for her injury and the resulting claims made against Sheetz.

A corollary to the punishment objective of punitive damages awards is the goal of ensuring that such awards will serve to deter similar conduct. Sheetz stated at trial that it has changed its corporate policy to comport with the employment laws of this State.[28] While we doubt that Sheetz would risk being subjected to a large jury verdict again for conduct similar to that at issue here,[29] nonetheless, an appropriately sized punitive damages award may be necessary to ensure against repetition of both the conduct and policies employed by Sheetz in this case.

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[28] Sheetz asserts that it has amended its written policy to prevent the discharge of workers' compensation recipients and has altered its unwritten policy that formerly required workers to be "100%" before returning to work. Appellee counters that she has not seen a copy of this policy.

[29] Sheetz claims to have been unaware of the West Virginia laws which it ultimately admitted to having violated. *See* W. Va. Code §§ 5-11-9; 23-5A-3.

Another *Garnes* factor which requires consideration is the reprehensibility of the defendant's conduct. When reviewing this issue, the trial court identified various indicia of Sheetz' reprehensibility, which included failing to accommodate Appellee's work restrictions, failing to permit her to return to work absent complete recovery, discharging her, refusing to rehire her, paying its managers bonuses tied to reduced workers' compensation premiums, and failing to acknowledge its awareness of Appellee's work restrictions upon her return to work. The record in this case is replete with factual evidence of reprehensible conduct on the part of Sheetz sufficient to permit an award of punitive damages.

The trial court concluded that there are no civil or criminal penalties available for comparison purposes for the conduct at issue here. While this State does not provide for criminal penalties for violations of the Human Rights Act[30] or the Workers' Compensation Act, the Workers' Compensation Act expressly provides for a cause of action premised on violation of its anti-discrimination provisions. *See* W. Va. Code § 23-5A-2. That enabling section, however, does not establish a penalty limit that could be referred to for comparison purposes. Sheetz argues that the trial court should have considered the cap placed by Congress on the total amount of compensatory and punitive damages recoverable for intentional Title VII violations at $300,000. *See* 42 U.S.C. § 1981a(b)(3)(D) (1996); *see also Rush v. Scott Specialty*

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[30] It is, however, a misdemeanor to willfully interfere with the Human Rights Commission or to violate a Human Rights Commission order. *See* W. Va. Code § 5-11-14.

Gases, Inc., 930 F. Supp. 194 (E.D. Pa. 1996), *rev'd on other grounds*, 113 F. 3d 476 (3rd Cir.1997) (comparing the $300,000 cap under federal law in remitting $3,000,000 punitive damages award to $300,000 in discrimination case that involved violations of both state and federal law). Because our Legislature has not established limits with regard to discrimination awards,[31] the trial court correctly concluded that it was without civil or criminal penalties for comparison purposes.

The additional *Garnes* factors considered by the trial court included the length of time Sheetz continued in its actions. Noting that Sheetz "continued upon its illegal course of conduct for nearly five years[,]" the trial court further observed that: "Not until opening statements did Sheetz, Inc. ever admit that their policies were illegal. Up until the first day of trial, Sheetz, Inc. denied any wrong-doing." The lower court also considered the complete absence of a fair and prompt settlement offer as well as the substantial costs[32] to Appellee in pursuing her claims

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[31] Through case law, this Court has established a limit on the amount of "incidental" damages that may be awarded by the West Virginia Human Rights Commission ("Commission") for humiliation, embarrassment, emotional and mental distress, and loss of personal dignity. In *Bishop Coal Co. v. Salyers*, 181 W. Va. 71, 381 S.E.2d 238 (1989), this Court set that figure at $2,500 with adjustments permitted only for inflation. The concern underlying the limitation was the defendant's constitutional right to a trial by jury for any higher awards. Because the action here was not before the Commission but before a circuit court and was in fact tried by a jury, the damages limitation discussed in *Salyers* is not applicable.

[32] The trial court noted that Appellee's counsel had advanced over $3,000 in costs and incurred $50,000 in legal fees in connection with its representation of Appellee.

against Sheetz. Additional review factors included the favorable financial position of Sheetz[33] and the appropriateness of a significant punitive damages award to discourage future bad acts as well as to encourage fair and reasonable settlements once a defendant is made aware of the fact that a clear wrong has been committed.

While we disagree with Sheetz' contention that *BMW* somehow altered the review factors previously identified in *Garnes*, we do wish to address this argument. While the *BMW* decision clearly delineates three "guideposts" for use in connection with the review of punitive damage awards, these so-called "guideposts" are merely reiterations of factors previously-adopted by both this Court and the United States Supreme Court. Contrary to Sheetz' position that *BMW* somehow alters this State's law on punitive damages review, each one of the "guideposts" was in fact applied by the trial court in its review of this case. Other than utilizing the "guidepost" terminology, *BMW* does not depart from existing law regarding punitive damages. Although *BMW* confines its analysis of the issue of notice to these three "guideposts" – a term that certainly suggests the possible use of additional factors – there is nothing in *BMW* that eliminates reference to previously-delineated factors that are not among the big three "guideposts." Proof of this point is gleaned from the section of the *BMW* opinion that discusses the second "guidepost." Although that particular "guidepost" is

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[33] The trial court referenced evidence indicating that Sheetz had revenues of approximately $1,500,000 per day in 1994.

phrased in terms of the ratio between the plaintiff's compensatory damages and the amount of the punitive damages, the *BMW* opinion approvingly quotes its prior decision in *TXO* as stating "the proper inquiry" to be "'"whether there is a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant's conduct as well as the harm that actually has occurred."'" ___ U.S. at ___, 116 S.Ct. at 1602 (quoting *TXO*, 509 U.S. at 460 (emphasis in original), quoting *Haslip*, 499 U.S. at 21). Thus, the Supreme Court's own analysis in *BMW* demonstrates by its reference to an expanded concept of "the proper inquiry" necessary to a ratio comparison that the "guideposts" were not crafted for the purpose of replacing existing law on punitive damages nor were they intended to be viewed in a limiting fashion, as Sheetz suggests. *See Rush*, 930 F. Supp. at 201 (referring to *BMW*, *TXO*, and *Haslip* and noting "[o]ur reading of these three opinions reveals a *presumably non-exclusive* list of factors that combine to create a reasonable verdict") (emphasis supplied). Upon analysis, there is simply no basis for Sheetz' suggestion that *BMW* demands that punitive damages awards be reviewed differently from the fashion in which they are currently being reviewed under *Garnes* and its progeny.

Because the record in this case lacks evidence that Sheetz' conduct towards Appellee with regard to the unlawful termination/failure to rehire claims was prompted by malice or an intent to cause her specific harm and because the evidence on these claims similarly fails to demonstrate fraud, trickery, or deceit on Sheetz' part, we cannot uphold the punitive to compensatory ratio of seven to one under our ruling in syllabus point

fifteen of *TXO*. *See* 187 W. Va. at 461, 419 S.E.2d at 874; *see also TXO*, 509 U.S. at 462 (upholding large punitive damages award, based in part, on employment of scheme involving "fraud, trickery and deceit"). Sheetz' conduct on these claims falls into a category of reckless disregard of Appellee's rights, rather than malice committed towards her. *See Rush*, 930 F. Supp. at 201. Under this Court's holding in syllabus point fifteen of *TXO*, we determine that the punitive damages award should be reduced by the amount of $466,260 so that a comparison of the punitive to the compensatory damages would result in a five to one ratio. 187 W. Va. at 461, 419 S.E.2d at 874. We find this result required by longstanding principles that mandate a reasonable relationship between the compensatory and punitive damages award.

We do not feel constrained to reduce the amount of the punitive damages awarded for the retaliation claim, however, despite the fifteen to one ratio,[34] due to the fact that the evidence introduced in connection with this claim crossed the line from reckless disregard of an individual's rights to willful, mean-spirited acts indicative of an intent to cause physical or emotional harm to Appellee in connection with her injury and resulting claims against Sheetz. As we stated in syllabus point fifteen of *TXO*, higher ratios between punitives and compensatories are permissible when the evidence suggests malevolence or actual intent to harm. *See* 187 W. Va. at 461, 419 S.E.2d at 874. The deceptiveness employed by Ms. Imler when feigning ignorance regarding Appellee's medical restrictions and Sheetz' continuing use of surveillance cameras

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[34] *See supra* note 26.

on Appellee is sufficiently analagous [sic] to the area of "fraud, trickery, or deceit" recognized by the United States Supreme Court in *TXO* as deserving of larger awards of punitive damages. *See* 509 U.S. at 462. Given the trial court's exemplary employment of the *Garnes* factors to this case as discussed above, we are satisfied that the trial court properly engaged in the review required and that the facts of this case with regard to the retaliation claim support upholding the fifteen to one ratio of punitive to compensatory damages without offending due process principles.[35]

The final matter which we address is Sheetz' request that this Court expand upon our recognition in *Mace v. Charleston Area Medical Center Foundation*, 188 W. Va. 57, 422 S.E.2d 624 (1992) and *Dzingliski v. Weirton Steel Corp.*, 191 W. Va. 278, 445 S.E.2d 219 (1994), that in those cases where emotional distress damages are sought and obtained without evidence of accompanying physical trauma, such awards "may assume the cloak of punitive damages." *Harless v. First Nat'l Bank*, 169 W. Va. 673, 690, 289 S.E.2d 692, 702 (1982). While the record in this case suggests that the evidence introduced regarding Appellee's suffering of emotional distress may indeed have been meager,[36] Sheetz agreed to the jury instruction on

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[35] Although we treated the claims separately, the trial court, in its review, grouped the claims and the damages awarded together, resulting in a 9:1 ratio.

[36] The only testimony Appellee offered regarding emotional distress in connection with the reprisal allegation was that the March 1993 letter from Sheetz made her feel "real bad." Her son testified additionally that his mother was very upset by Sheetz' treatment of her. Appellee did not introduce any

emotional distress damages and jointly submitted the verdict form which expressly allowed the jury to consider punitive and emotional distress damages. Accordingly, we decline to consider this issue when Sheetz did not raise the issue below for the trial court's consideration in the first instance. *See Sands*, 143 W. Va. at 522, 102 S.E.2d at 734, syl. pt. 2. We similarly refuse to address the issue of instructional error raised in the first instance on appeal when no objection was made below.[37] *See Horan v. Turnpike Ford, Inc.*, 189 W. Va. 621, 626, 433 S.E.2d 559, 564 (1993) (stating that " 'party may only assign error to the giving of instructions if he objects thereto before arguments to the jury are begun stating distinctly the matter to which he objects and the grounds of his objection' ") (quoting Syl. Pt. 1, *Roberts v. Powell*, 157 W. Va. 199, 207 S.E.2d 123 (1973)).

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evidence of psychiatric or psychological treatment nor any medical testimony of related trauma to support her claim for emotional distress.

[37] Sheetz asserts on appeal that the punitive damage instruction given was in error for failure to include language concerning the requirement noted in *Harless* II that the "plaintiff must prove *further egregious conduct* on the part of the employer[ ]" to be entitled to punitive damages, rather than just the act of retaliatory discharge. 169 W. Va. at 692, 289 S.E.2d at 703 (emphasis supplied). Sheetz admits that it failed to object to the form of the punitive damages instruction, but invites this Court to find error under the plain error doctrine. *See* syl. pt. 4, *Voelker v. Frederick Business Properties Co.* 195 W. Va. 246, 465 S.E.2d 246 (1995). We decline to address this assignment under the plain error rule. *See Maples v. West Virginia Dep't of Commerce*, 197 W. Va. 318, 323-24, 475 S.E.2d 410, 415 (1996) (discussing effect of waiver of right to review on plain error doctrine).

Based on the foregoing, this matter is reversed, in part, and remanded to the Circuit Court of Berkeley County for entry of an order consistent with this opinion.

Reversed, in part, and remanded.

No. 23463 – Cheryl L. Vandevender, Plaintiff Below, Appellee v. Sheetz, Inc., a Pennsylvania corporation, Defendant Below, Appellant and Karen Foltz, Defendant Below, Appellee

(Filed July 17, 1997)

MAYNARD, Justice, dissenting:

Cheryl Vandevender was essentially out of work for four weeks. She also suffered other minor mistreatment. For this, she received $123,866 in compensatory damages, $170,000 for noneconomic damages, and almost 2.7 million dollars in punitive damages! The total verdict was a few dollars shy of *three million dollars*! In the majority opinion, this Court upholds over 2-1/2 million dollars of that verdict, including the outrageous sum of $2,232,740 in punitive damages. I strongly dissent because I believe that punitive damages are not recoverable for West Virginia Human Rights Act and Workers' Compensation Act violations.

The majority declines to address the issue of whether the Human Rights Act and Workers' Compensation Act violations provide for punitive damages because the appellant failed to raise this issue below. However, because it is clear that these acts do not specifically

authorize punitive damages awards and our case law indicates that punitive damages are not an element of damages under the Human Rights Act, I believe that the circuit court was totally without the jurisdiction to order such an award.

In addition to an order of reinstatement and back pay, the Human Rights Act provides that a court may order "other legal and equitable relief as the court deems appropriate" for violations of Human Rights Act discrimination provisions. W. Va. Code § 5-11-13(c). Although, the Workers' Compensation Act does not address the relief available for workers' compensation discrimination, I believe that it would not differ from the relief available under the Human Rights Act. According to *Dobson v. Eastern Associated Coal Corp.*, 188 W. Va. 17, 24, 422 S.E.2d 494, 501 (1992), "other legal and equitable relief" means that a plaintiff bringing a discrimination claim may generally recover damages available in tort. In *Harmon v. Higgins*, 188 W. Va. 709, 711, 426 S.E.2d 344, 346 (1992), however, this Court noted that the trial court had treated the sexual harassment case as a *Harless*[1] action and not as a Human Rights Action, and stated that "punitive damages . . . are allowed in a *Harless*-type case but are not an element of damages under the Human Rights Act. In *Guevara v. K-Mart Corp.*, 629 F.Supp. 1189, 1190-91 (S.D. W. Va. 1986), Judge Haden noted that the case was pled

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[1] *Harless v. First National Bank in Fairmont*, 162 W. Va. 116, 124, 246 S.E.2d 270, 275 (1978) where this court explained that "[w]here the employer's motivation for the discharge contravenes some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by the discharge." (footnote omitted).

as a *Harless* action rather than under the Human Rights Act, and stated that the plaintiff's "requested elements of damage are more extensive than those available under the [Human Rights Act]. For example, she seeks an award of punitive damages equal to the claimed amount of compensatory damages." This Court should be consistent in its statements of the law and hold here that punitive damage awards are not applicable under the Human Rights Act and the Workers' Compensation Act. Based upon the absence of a clear legislative statement that punitive damages are recoverable and the language in the cases cited above, I believe that punitive damages are not recoverable in this case.

It is clear that the appellee was treated badly by the appellant, and that the appellant should have to pay her a fair amount of damages. However, the operative word here is "fair." The appellee was awarded $293,866.00 in compensatory and noneconomic damages for missing essentially four weeks of work and for the appellant's other mistreatment of her, and I do not believe that this was improper, and it seems fair. But even if a punitive damages award were authorized here, an award of $2,232,740 is simply too much under the facts of this case. The task of determining what constitutes an excessive punitive damages award, in light of due process guarantees, is extremely difficult, and not given to bright line rules. Admittedly, I do not have all the answers in making such a determination, and frankly, I can't presently state what the terms of a good rule should be. I am reminded, however, of United State Supreme Court Justice Potter Stewart's comment that although he could not

define hard-core pornography, "I know it when I see it."[2] Likewise, I know an excessive punitive damages award when I see one, and I see one here. I would call this one hard-core. Therefore, I dissent.

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[2] *Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S.Ct. 1676, 1683, 12 L.Ed.2d 793, 804 (1964) (Justice Stewart concurring).

APPENDIX B

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

CHERYL L. VANDEVENDER, Plaintiff,	)	
vs.	)	Civil Action
SHEETZ, Inc., a Pennsylvania Corporation, and KAREN FOLTZ, an individual,	)	No. 94-C-653
Defendants.	)	

ORDER DENYING DEFENDANT SHEETZ, INC.'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND/OR FOR NEW TRIAL AND/OR REMITTITUR

On a previous day came the parties, by counsel, pursuant to defendant Sheetz, Incs.'s "Motion For Judgment Notwithstanding The Verdict And/Or For New Trial And/Or Remittitur."[1] The Court, mindful of its obligations as explained in *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656 (1991), has considered the evidence adduced at trial and has: reviewed whether the punitive damages awarded bear a reasonable relationship to the harm that is likely to occur from Sheetz, Inc.'s conduct as well as the harm that has actually occurred; reviewed the reprehensibility of Sheetz, Inc.'s conduct; considered whether

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[1] Defendant Foltz, having agreed that a directed verdict was appropriate on three counts, did not file any post-trial motions.

Sheetz, Inc. profited from its wrongful conduct; considered Sheetz, Inc.'s financial position; considered the costs of litigation, the lack of any criminal sanction, the absence of other civil actions based upon the same conduct, the appropriateness of punitive damages to encourage fair and reasonable settlement once the fact that a clear wrong was committed is apparent, and, as a matter of fundamental fairness, whether the punitive damages awarded bear a reasonable relationship to the compensatory damages awarded.

Viewing the evidence in a light most favorable to the nonmoving party, the Court finds that the jury reasonably could have found or inferred the following facts:

> Plaintiff was a good, hard working employee who, with the help of her manager, defendant Karen Foltz, studied at night to advance to a position as assistant manager. That plaintiff was a good assistant manager who had the potential and was studying to become a manager. That, through no fault of her own, plaintiff suffered a disabling workplace injury in January, 1991. Despite her injury, and in order to support four dependents, plaintiff kept trying to work. Though a light duty program was alleged to have existed, no light duty was offered to plaintiff. Plaintiff was told that Sheetz, Inc. corporate policy required that she be able to perform her job 100%, including lifting fifty pounds and standing for up to eight hours at a time – no accommodations would be made. After eight months of trying to work, plaintiff required back surgery. Surgery revealed extensive scarring and a rip in the dura caused by her continued efforts

to perform all aspects of her job without accommodation. The extensive scarring caused a prolonged recovery period during which time plaintiff received temporary total disability benefits.

In October, 1992 plaintiff met with defendant Foltz and advised her that she was able to come back to work but would be permanently unable to perform heavy lifting. Defendant Foltz told her that, pursuant to Sheetz, Inc. policy, she could not return to work unless she was "100%." Defendant Foltz knew that plaintiff's limitations could easily be accommodated as there were always other employees working at the same time who could assist with heavy lifting. This was particularly true for managers and assistant managers such as plaintiff who were encouraged to delegate responsibilities. Defendant Foltz felt bound, however, to follow corporate policy as explained by her district manager.

Consistent with what had been told to her by her manager, plaintiff continued to report to her treating physician that Sheetz, Inc. required her to be 100% before she would be allowed to return to work. As a result, her physician continued to certify her as TTD. Plaintiff's physician testified that the only reason he certified plaintiff as TTD was because her employer refused to accommodate her lifting restrictions.

In March, 1993, pursuant to Sheetz Inc. written policy requiring the termination of any employee who is sick or disabled for twelve months, plaintiff was fired. Sheetz, Inc. fired plaintiff despite knowing that she could be accommodated and was, as stipulated, qualified

to perform all of the essential job functions of an assistant manager or salesperson.

Sheetz, Inc.'s policy of firing disabled employees is consistent with Sheetz, Inc.'s bonus system that penalizes managers and district managers for increased Workers' Compensation expenses. As explained by a vocational rehabilitation specialist and plaintiff's treating physician, many employers in this area fear that once an employee suffers one compensable injury they are more likely to suffer future injuries and claim compensation benefits again. Thus, many employers in this area will not return an injured employee to work preferring instead to discharge the employee from employment. To increase their bonus, Sheetz, Inc. managers and district managers prefer to see disabled employees fired instead of carrying the expense and risk of a worsened compensation rating. Thus, Sheetz, Inc.'s written policy requiring termination of disabled employees serves to increase management bonuses.

Defendant Sheetz, Inc.'s in-house insurance risk manager, not Sheetz, Inc.'s human resources group, continued to monitor plaintiffs physical condition because they were contesting an award of permanent partial disability through Workers' Compensation. In a report prepared by Dr. Said and submitted to Sheetz, Inc. through the Workers' Compensation fund, it was clear that plaintiff's physical limitations did not prevent her from working so long as reasonable accommodations were made for her lifting restrictions. Notwithstanding such knowledge, and consistent with their own written policy, Sheetz, Inc. make no effort to return plaintiff to

employment. Sheetz, Inc.'s refusal to return plaintiff to work is inconsistent with the public policy of this State which is to return employees to work as soon as is prudent and practicable.

On October 12, 1994, Trudy Rohrbaugh, a vocational rehabilitation counselor employed by the Division of Vocational Rehabilitation, contacted Sheetz, Inc. through their manager, defendant Foltz, and asked whether plaintiff could return to work. Mrs. Rohrbaugh testified and her notes reflect that Sheetz, Inc. would not allow plaintiff to return to work because she had already been terminated and that she was not welcome to even reapply for employment. This was Sheetz, Inc.'s position despite the fact that over the several years of plaintiff's disability literally hundreds of employees had been hired and discharged and all agreed that plaintiff had been a good worker.

In January, 1995 defendant Foltz gave her deposition. By this time, defendant Foltz, in recognition of her knowledge of Sheetz policies, had been promoted to the newly created position of regional trainer. Based in a new regional training center, the regional trainer was to train new employees in Sheetz policies and procedures. Contrary to Sheetz, Inc.'s answer to the complaint, defendant Foltz admitted that plaintiff's limitations could be accommodated, and thus, plaintiff was a qualified handicapped individual. Indeed, defendant Foltz candidly admitted that Sheetz, Inc.'s list of "essential job functions" were not essential at all. Nearly all of the so-called "essential functions" and especially the requirements that one be able to lift fifty pounds and stand for eight hours at a time,

which had been the main requirements upon which Sheetz relied in refusing to allow plaintiff to return to work, could, according to Karen Foltz, be readily accommodated.

That same day, upon hearing defendant Foltz's testimony, plaintiff demanded to be returned to her former job.[2] Shortly thereafter, Sheetz Inc. fired Karen Foltz. The jury reasonably could have inferred that Karen Foltz was terminated in retaliation for her truthful testimony contrary to the posture Sheetz, Inc. took in its answer to the complaint. Defendant Sheetz, Inc. never did offer plaintiff her former job. Instead, they offered her a two level demotion to the position of sales clerk and attached to their offer the same "essential job functions" that had already proved to be a farce.

Notwithstanding the demotion, plaintiff accepted the offer of re-employment in the hope that she could soon re-prove her dedication and be promoted back to assistant manager. Approximately one month before her return to work, Sheetz, Inc. required plaintiff to undergo an independent medical examination. The results of that exam were forwarded to Mary Anslinger, the aforementioned insurance risk manager.

Ms. Anslinger met with the district manager for this area. Vicki Imler, and discussed this

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[2] At trial, Sheetz, Inc. attempted to persuade the jury that, unsolicited, they offered reinstatement to plaintiff. It is now clear that this offer did not arise out of a vacuum; plantiff's counsel demanded that plaintiff be reinstated after defendant Foltz candidly admitted during her deposition that plaintiff could have been working all along. Thus, defendant Sheetz, Inc.'s claim that their intentions were good is dubious, at best.

litigation and plaintiff's medical condition. They agreed, that even though district managers such as Ms. Imler do not ordinarily train employees, because of this litigation, Ms. Imler would be personally present on plaintiff's first day back to work.

Plaintiff returned to work on April 17, 1995. Upon entering the store, plaintiff was ordered to meet with Ms. Imler and the store manager. After Imler allegedly experienced some computer difficulty in entering plaintiff's social security number, plaintiff was ordered to stock the cooler. Stocking the cooler required continuous bending, twisting, squatting, lifting, and occasional crawling. All activities that are quite difficult and dangerous for a handicapped person such as plaintiff to perform. Plaintiff asked Imler whether Imler was aware of plaintiff's physical limitations. Imler concealed the fact that she had met with Anslinger and discussed plaintiff's physical limitations and instead, feigned awareness of only Dr. Said's July, 1994 report. Plaintiff attempted to inform Imler that she should not attempt to do that kind of work. Imler then told plaintiff that until Imler saw an updated doctor's slip, she (Imler) did not "see" any physical restrictions. Despite having submitted to an IME only a month earlier, Imler ordered plaintiff to obtain a medical evaluation by the coming Friday.[3] Plaintiff, not wanting to appear like a complainer, attempted to stock the cooler as ordered.

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[3] This was all the more onerous because plaintiff was scheduled to work every day that week, including Friday.

Predictably, the bending, twisting, and lifting required to stock the cooler caused plaintiff's impairment to worsen. Plaintiff had difficulty completing her entire shift, had to return to her physician, and was unable to work the following day. Plaintiff did not return to work.

Sheetz, Inc. trains surveillance cameras on employees while they work. According to Auslinger, they do this to insure that handicapped employees do not exceed their limitations. On April 18, 1995, the day after plaintiff's return to work, Imler returned to the store to retrieve the surveillance tape. Allegedly without being so directed, various sales clerks began surveilling and taking pictures of plaintiff when she shopped at the store. Those pictures then made their way to Anslinger's file at corporate headquarters. No one accepted responsibility at trial for this surveillance.

Sheetz, Inc., a corporation that in 1994 was grossing $1.5 million per day, had total revenues between 1992 and 1994[4] of $1.47 *billion*, had retained earnings of $18.7 million in 1994 alone, had twenty employees in its human resources department, went to great lengths to surveil plaintiff, asked the jury to believe it was all simply a mistake and that they had changed their ways. That claim was not credible as the jury specifically found that Sheetz, Inc. retaliated against plaintiff.

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[4] Sheetz, Inc. did not provide plaintiff with 1995 figures. Since Sheetz, Inc. did not put 1995 figures into evidence, the jury could reasonably infer that business continues to be good.

The Court has also considered the following as relevant to its review, though this information was not available to the jury:

> Not until opening statements did Sheetz, Inc. ever admit that their policies were illegal. Up until the first day of trial, Sheetz, Inc. denied any wrongdoing. Indeed, early in this litigation, plaintiff offered to settle this case for $30,000.00 plus her job back. In making that demand, plaintiff clearly explained why liability was clear. Despite such knowledge, Sheetz, Inc. refused to give plaintiff her former job back and never offered a single cent to settle this case. Plaintiff's counsel advanced over $3000.00 in costs and over $50,000.00 in legal fees pursing plaintiff's claims. Now, more than a month after the verdict, despite having admitted liability for the first time in opening statements, having stipulated to $7000.00 in medical expenses, Sheetz, Inc. still has not paid plaintiff one penny – not even plaintiff's stipulated medical expenses.

Upon reviewing all of the relevant factors, this Court affirms the jury's award of punitive in their entirety and all but $6200.00 of the compensatory damages awarded.[5] The Court finds that punitive damages do bear a reasonable relationship to the harm that has occurred to the plaintiff as well as to the harm that was likely to occur to the plaintiff (that ratio being approximately nine to one). The harm to plaintiff and her family was considerable, both financially and personally. Defendant Sheetz, Inc.'s

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[5] *See infra* wherein the Court orders a remittitur of $6200.00 for medical expenses.

actions were in clear and knowing derogation of plaintiff's fundamental and civil rights and should well have been expected to cause substantial hardship to the plaintiff. The Court notes that Sheetz, Inc. is a large, profitable corporation and has access to competent legal counsel.

Sheetz, Inc. continued upon its illegal course of conduct for a period of nearly five years. Such acts included refusing to accommodate plaintiff's work restrictions, refusing to reinstate plaintiff after suffering a compensable workplace injury, discharging plaintiff from employment, refusing to rehire plaintiff, and refusing to allow plaintiff to even apply for reemployment. Other illegal acts that justify a substantial award of punitive damages include retaliating against a manager who testified during a deposition contrary to Sheetz, Inc.'s position, and retaliating against plaintiff upon her negotiated return to work by requiring her to perform work activities which defendant's managers knew she could not perform without risking re-aggravating her injuries or causing new injury.

The Court further finds that Sheetz, Inc., by policy and practice, has attempted to evade its responsibilities to workers injured in the line of duty by discharging them and refusing in derogation of our laws, to reemploy such injured workers. Such policies and practices have the effect of increasing Sheetz, Inc.'s profits at the expense of honest competitors, other honest employers and their employees, and to the detriment of the citizens of this State. The Court notes that most, if not all of the operative facts in this case, took place after the passage of

the Americans with Disabilities Act, an Act that has been the subject of considerable public discussion and awareness. It is simply not credible for Sheetz, Inc. to claim, as it attempted to do in argument, that it made "mistakes." Indeed. Sheetz, Inc. paid bonuses to managers based on their ability to reduce Workers' Compensation premiums, thus encouraging conduct that violates State public policy.

The Court finds that Sheetz, Inc.'s financial position over the nearly five years that it has engaged in such wrongful conduct has been strong. The Court notes that in 1994, Sheetz, Inc. was receiving revenues of approximately $1.5 million per day. Sheetz, Inc.'s revenues and profits far exceed the amount awarded and, therefore, the punitive damage award does not offend due process principles.[6]

Moreover, the Court finds that the punitive damages awarded bear a reasonable relationship to the compensatory damages due in considerable part, to the affirmative, retaliatory conduct of Sheetz, Inc. in refusing to accommodate plaintiff, discharging her, refusing to allow her to reapply for employment, and in retaliating against her when she was finally returned to work.

The Court finds that the costs of bringing this matter on for trial were substantial. Plaintiff's counsel represents that in excess of $50,000.00 in fees were expended and in

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[6] Sheetz, Inc. chose not to address the issue of whether it has insurance coverage available in its post-trial motion for remittitur. The Court recalls, however, that Sheetz, Inc.'s corporate representative at trial was its insurance claims administrator.

excess of $3000.00 in costs advanced in order to protect plaintiff's civil rights. Plaintiff's counsel clearly explained their theory of the case to defendants very early in this litigation and made a reasonable demand to settle this action. The Court finds that Sheetz, Inc. refused to engage in settlement negotiations even though liability was clear. Indeed, Sheetz, Inc. admitted liability in opening statement. The Court further finds that Sheetz, Inc. continues, despite its claimed remorse, to refuse to pay to plaintiff even her stipulated medical expenses.

The Court grants Sheetz, Inc.'s motion for remittitur of $6200.00 of the $13,200.00 awarded for medical expenses. No evidence was presented which would justify such an award. The Court denies the remainder of Sheetz, Inc.'s motion for remittitur on the basis that adequate evidence was adduced at trial to support each element of damages awarded, denies its motion to set aside the verdict, and refuses to award a new trial. Defendant's exception is noted.

The Clerk is directed to deliver an attested copy of this Order to all counsel of record.

Entered: November 9, 1995

/s/ T.W. Steptoe, Jr.
JUDGE

A TRUE COPY
ATTEST
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Clerk Circuit Court
By: /s/ illegible
Deputy Clerk

APPENDIX C

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

CHERYL L. VANDEVENDER,

Plaintiff,

vs.

Civil Action No. 94-C-653

SHEETZ, Inc., a Pennsylvania Corporation, and KAREN FOLTZ, an individual,

Defendants.

JUDGMENT ORDER

CAME THE parties, Cheryl Vandevender by her counsel, David M. Hammer and Robert J. Schiavoni, Sheetz, Inc. by its counsel, Norwood Bentley, III, and Karen Foltz by her counsel, Harry P. Waddell on September 12, 1995 for a trial of this matter before the Honorable Thomas Steptoe, Judge of the Circuit Court of Berkeley County, West Virginia.

Whereupon, six qualified jurors were selected to well and truly try the issues before them. Whereupon said jurors heard all of the evidence presented to them.

Whereupon, upon the conclusion of plaintiff's case in-chief, counsel for Sheetz, Inc. moved that the Court direct a verdict against plaintiff and in favor of defendant on the issue of the availability of back pay during periods of time when plaintiff was receiving temporary total disability benefits. Said motion was denied.

Whereupon, upon the close of all the evidence, defendant Sheetz renewed its motion for directed verdict and plaintiff moved for directed verdict upon 1) defendant Sheetz, Inc.'s unlawful termination of plaintiff pursuant to West Virginia Code §§ 23-5A-1 *et seq.*, 2) defendant Sheetz, Inc.'s unlawful refusal to allow Cheryl Vandevender to return to work, and 3) defendant Sheetz, Inc.'s unlawful refusal to allow Cheryl Vandevender to apply for employment in any capacity. Defendant Sheetz, Inc. did not object to a directed verdict on the issue of plaintiff's unlawful termination in violation of West Virginia Code §§ 23-5A-1 *et seq.*, Defendant Foltz agreed that directed verdict was appropriate as to all three counts. Whereupon the Court directed a verdict on the three counts.

Whereupon the Court instructed the jury upon the law applicable to the case and the jury retired to the jury room for deliberations. Presently, on September 14, 1995 the jury returned with its verdict:

> 1. You are instructed that defendant Sheetz, Inc. unlawfully terminated Cheryl Vandevender's employment on March 15, 1993 in violation of West Virginia Code §§ 23-5A-1 *et seq.*
>
> 2. You are instructed that defendant Sheetz, Inc.'s refusal to allow Cheryl Vandevender to return to work is an unlawful discriminatory practice as prohibited by the West Virginia Human Rights Act.
>
> 3. You are instructed that defendant Sheetz, Inc.'s refusal to allow Cheryl Vandevender to apply for rehire is an unlawful

discriminatory act as prohibited by the West Virginia Human Rights Act.

Therefore, you may award such damages as you believe are just.

$ 52,281.00	Past wage loss (including, but not limited to, wages and health insurance)
30,259.00	Future wage loss (including, but not limited to, wages and health insurance)
7000.00	Medical Expenses
12,208.00	Tuition, books, supplies, travel expenses
120,000.00	General damages (emotional distress, upset, embarrassment, humiliation)
1,575,000.00	Punitive damages
$1,796,748.00	TOTAL FOR THIS COUNT

4. We, the jury, find that Sheetz, Inc. retaliated against Cheryl Vandevender upon her return to work.

Yes X No ___

$ 22,118.00	Future wage loss (including, but not limited to, wages and health insurance)
6200.00	Medical Expenses
0.00	Tuition, books, supplies, travel expenses
50,000.00	General damages (emotional distress, upset, embarrassment, humiliation)
1,124,000.00	Punitive damages
$1,202,318.00	TOTAL FOR THIS COUNT

Whereupon, the jurors were polled and all affirmed that this was their verdict.

Whereupon, the Court ordered that such verdict be entered. Pursuant to the West Virginia Human Rights Act, the Court orders that plaintiff submit all of her attorney's fees and costs reasonably incurred to date within fifteen days of the entry of this Order. Pre-judgment interest upon plaintiff's special damages shall begin to run from October 1, 1992 up and through September 14, 1995. Post-judgment interest to be calculated upon the entirety of the verdict, including attorneys' fees and costs, beginning upon September 15, 1995 and continuing until this judgment is satisfied. Upon the request of plaintiff's counsel, pursuant to the West Virginia Human Rights Act, the Court shall entertain a motion to retain equity jurisdiction so as to remedy the effects of defendant Sheetz, Inc.'s discriminatory practices.

The Clerk is directed to deliver an attested copy of this Judgment Order to all counsel of record.

DATED: 10/13/95

/s/ T.W. Steptoe, Jr.
JUDGE
CIVIL ORDER NO 160
ILLEGIBLE 563
ILLEGIBLE 10-16-95
Note – There is objection to the form of this Order.

T.W.S., Jr.

APPENDIX D

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 3rd day of September, 1997, the following order was made and entered:

Cheryl L. Vandevender, Plaintiff
Below, Appellee

vs.) No. 23463

Sheetz, Inc., a Pennsylvania corporation,
Defendant Below, Appellant

Karen Foltz, an individual, Defendant
Below, Appellee

The Court, having maturely considered the petition for rehearing and reargument filed in the above-captioned case, is of opinion to, and doth hereby, deny the prayer of the petitioner and doth hereby order that the final order entered herein be made absolute and certified as heretofore directed. Justice Maynard would grant.

A True Copy

Attest: /s/ Rodney Teal
Clerk, Supreme Court of Appeals

Supreme Court, U.S.
FILED
DEC 29 1997
CLERK

No. 97-891

In The

Supreme Court of the United States

October Term, 1997

SHEETZ, INC.,

Petitioner,

vs.

CHERYL L. VANDEVENDER,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner fails in its obligation to set forth that which is essential to a ready and adequate understanding of the points requiring consideration. Specifically, petitioner does not and cannot show that the federal questions it now seeks to present were raised and passed upon by the court of first instance and in the appellate court. Supreme Court Rule 14(1)(g)(i).

On December 1, 1994, Cheryl Vandevender instituted suit against Sheetz, Inc. and her former manager, Karen Foltz, alleging that defendants discriminated against her in the course of her employment and attempts at re-employment on the basis of her workplace injury in violation of the West Virginia Human Rights Act, W. Va. Code § 5-11-1, *et seq.*, and the West Virginia Workers Compensation Act, W. Va. Code § 23-5A-1, *et seq.*

Respondent expressly sought recovery for punitive damages in her complaint and amended complaint.[1] Despite twice having the opportunity to answer, the petitioner did not assert any affirmative constitutional defense to punitive damages, did not move for dismissal of the punitive damage claim, did not move for summary judgment, did not seek to bifurcate issues of liability and punitive damages, and did not move for directed verdict at any stage of the trial seeking dismissal of the punitive damages claim. *See, e.g.* directed verdict motion (9/13/95 Tr. at 53, Respondent's App. A); renewal of directed verdict motion (9/13/95 Tr. at 188, Respondent's App. B).

Post-trial, respondent submitted proposed findings of fact which the trial court substantially adopted in its review affirming the punitive damage awards. Petitioner's App. B. Although

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1. An amended complaint was filed alleging retaliation based upon events that occurred when Mrs. Vandevender returned to employment following counsel's demand for re-employment.

petitioner had the opportunity, it apparently chose not to submit proposed findings of fact and requested no hearing upon the facts as presented by respondent. Thus, petitioner abandoned its right to participate in trial court level review of the punitive damage awards.

The trial court's findings of fact were then reviewed by the West Virginia Supreme Court of Appeals under a deferential standard of review. Under that standard the more "fact dominated" the issue, the more deference is extended to the lower court unless it is shown that the findings of facts are clearly erroneous. *Tennant v. Marion Health Care Foundation*, 194 W. Va. 97, 106 (1995). *See also Brown v. Gobble*, 196 W. Va. 559, 563, 474 S.E. 2d 489, 493 (W. Va. 1996) (the Supreme Court of Appeals will disturb only those factual findings that strike us wrong with the 'force of a five-week-old, unrefrigerated, dead fish'). Petitioner did not challenge the trial court's findings of fact as being clearly erroneous and thus again abandoned the review process. The West Virginia Supreme Court issued a *per curiam* opinion[2] reducing the punitive damages awarded under Count I and affirming the punitive damages awarded under Count II.

In the court of first instance, the scant record developed by petitioner and upon which petitioner must now rely in seeking further review by this Court of the punitive damages awarded is as follows. Petitioner stated as its objection to punitive damages evidence during the trial: "[Punitive damages] was objected to as Defendant did not feel that there was sufficient evidence for a punitive instruction to go to the jury." (9/14/95 Tr. at 80, Respondent's App. C). In seeking a new trial, petitioner argued,

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2. Per curiam decisions in West Virginia "are used to decide only the specific case before the Court; everything in a per curiam opinion beyond the syllabus point is merely obiter dicta." *Lieving v. Hadley*, 188 W. Va. 197, 201, n.4, 423 S.E. 2d 600, 604, n.4 (1992).

without particularity, that the evidence to support an award of punitive damages was insufficient and that punitive damages were inappropriate because of the recovery of compensatory non-economic damages, nothing more. (Defendant Sheetz, Inc.'s Motion for Judgment Notwithstanding the Verdict and/or for a New Trial and/or Remittitur and Memorandum in Support Thereof, pp. 19-21, App. D). In other words, the trial court was not presented with the federal question of notice now presented by petitioner's writ.[3]

With regard to petitioner's constitutional claim of excessiveness as measured against petitioner's wealth, the respondent offered an expert on the wealth of Sheetz without objection as to his qualifications or to his opinion. Petitioner did not call its own witness to interpret or explain the financial data that respondent presented to the jury. Instead, petitioner relied solely upon its cross-examination of respondent's expert and asked only one "meaningful" question about Sheetz's financial position:

> Now the total revenues that you have put up on the board, those don't mean profits? Those are not all the moneys that are available to Sheetz, what Sheetz has available to it to do whatever it wants to at their discretion?

(9/13/95 Tr. at 49, Respondent's App. E).

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3. In fact, the petitioner agreed to presenting the jury with a verdict form allowing the jury to consider the award of punitive damages for the first three counts and a separate award for the fourth count. In addition, the petitioner offered no objection to the substance of the jury instruction on punitive damages, thereby waiving any claim that the jury was improperly instructed as to whether to award punitive damages or on how to calculate punitive damages.

The petitioner then failed to make any argument in its "Motion for Judgment Notwithstanding the Verdict and/or for a New Trial and/or Remittitur and Memorandum in Support Thereof" as to why the petitioner believed the verdict to be excessive as measured by the wealth of the company. Thus, petitioner did not present the court of first instance with the federal question of excessiveness as measured against wealth now presented by petitioner's writ.

Petitioner now asserts as error that "the court also did not consider prior judicial decisions stating that punitive damages are not even available for Human Rights Act violations." Petition at 13. Petitioner suggests that the West Virginia Supreme Court of Appeals erred when it allowed punitive damages to stand under the West Virginia Human Rights Act. The West Virginia Supreme Court, in fact, rejected that very argument because petitioner failed to raise it at the trial court level. Petitioner's App. A, pp. 19-20. Moreover, the West Virginia Supreme Court expressly found, as a matter of state law, that petitioner's conduct permitted an award of punitive damages. Petitioner's App. A, pp. 20-23.

In sum, the record reflects that petitioner did not raise at trial or in its post trial motion the points on which it now seeks review. Before arguing that due process has been denied, petitioner must first show that it utilized the process available to it. The record reveals that petitioner failed to preserve that which it now claims as error.

REASONS FOR DENYING THE WRIT

I.

FAILURE TO PRESERVE ERROR

West Virginia maintains strict standards for preservation of error and development of a record for review. In *Whitlow v. Bd. of Educ. of Kanawha Cty.*, 190 W. Va. 223, 438 S.E. 2d 15 (1993), the court held that "when nonjurisdictional questions have not been decided at the trial court level and are then first raised before this Court, they will not be considered on appeal." *Id.* 190 W. Va. at 226 [citations omitted]. *Whitlow* succinctly stated the basis for this rule:

> The rationale behind this rule is that when an issue has not been raised below, the facts underlying that issue will not have been developed in such a way so that a disposition can be made on appeal. Moreover, we consider the element of fairness. When a case has proceeded to its ultimate resolution below, it is manifestly unfair for a party to raise new issues on appeal. Finally, there is also a need to have the issue refined, developed, and adjudicated by the trial court, so that we may have the benefit of its wisdom.

Id. Petitioner should have, but did not, raise the constitutional issues of notice and excessiveness as measured against wealth in the court of first instance.

After the jury returned its punitive damage awards, petitioner should have, but did not, engage in a *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E. 2d 897 (1991) review of those awards. Nonetheless, without participation by petitioner, the trial court made a *Garnes* analysis. *See* Petitioner's App. B.

Now, although the appellate court reviewed the punitive damage awards for excessiveness and expressly found that the trial court's review included each of the "guideposts" addressed in *BMW v. Gore*, 517 U.S. ___, 116 S. Ct. 1589 (1996) (Petitioner's App. A., p. 33), petitioner argues that, first, the trial court's review and, next, the appellate court's review violated its constitutional right to Due Process.

As a matter of West Virginia state law, a party who fails to invoke a *Garnes* review cannot then complain about the lack of Due Process. In *Horan v. Turnpike Ford, Inc.*, 189 W. Va. 621, 433 S.E. 2d 559 (1993), the West Virginia Supreme Court of Appeals held that "since the *Garnes* issue was not timely raised at the trial court level [by defendant], it is not controlling on appeal." *Id.*, at 626. In *Horan*, the appellant argued that the trial court did not follow *Garnes*. The *Horan* opinion notes that appellant did not offer a jury instruction based on *Garnes*, failed to object to the trial court's punitive instruction, withdrew its own punitive damage instruction in favor of appellee's instruction, and did not raise *Garnes* until the post-trial proceedings. The instant case is on all fours with *Horan* with the notable exception that, unlike the appellant in *Horan*, petitioner here did not even ask the trial court to undertake a *Garnes* analysis post-trial.

Petitioner was obligated under state law to address each *Garnes* factor with particularity in its Petition to the West Virginia Supreme Court of Appeals. Petitioner failed to do so. Petitioner's App. A, p. 26. *Garnes*, itself, addresses the standard for preserving error for review:

> In our review of the petition, we will consider the same factors that we require the jury and trial judge to consider, and all petitions must address each and every factor set forth in Syllabus Points 3 and 4 of

> this case with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage.

Id., 186 W. Va. at 669.

Had petitioner addressed each and every factor set forth in *Garnes*, the West Virginia Supreme Court of Appeals would have reviewed the lower court's finding of facts under a clearly erroneous standard to determine whether, under the analysis contained in *Garnes* and *BMW*, the facts found by the trial court support the punitive damages awarded. Due to its failure to address the required factors at the state appellate level and because petitioner cannot now argue that the findings are clearly erroneous, petitioner has shifted its appeal strategy. Petitioner now asserts that the trial court's review was not meaningful and adequate and, therefore, should be set aside as a matter of law. In effect, the new argument by petitioner attempts to nullify the record and disregard West Virginia law requiring that error be preserved.

Petitioner argues that its right to Due Process under the Fourteenth Amendment was violated by the trial court's inadequate review of the punitive damage award under a *BMW* analysis. Obviously, the lower court could not have abused its discretion when petitioner either acquiesced or contributed to the alleged error by not seeking or participating in a meaningful due process review below. *See Maples v. West Virginia Department of Commerce*, 197 W. Va. 318, 475 S.E. 2d 410 (1996) (litigant may not silently acquiesce to error, and objections not made at trial will not be considered on appeal); *Smith v. Bechtold,* 190 W. Va. 315, 438 S.E. 2d 347 (1993) (inappropriate to grant relief to party who invites error in lower tribunal); *Interest of S.C.*, 168 W. Va. 366, 284 S.E. 2d 867 (1981) (a litigant may not actively contribute or silently acquiesce to

error and then raise that error as reason for reversal on appeal). Thus, in accordance with the rulings in *Whitlow* and *Tanner v. Rite Aid of West Virginia, Inc.*, 194 W. Va. 643, 461 S.E. 2d 149 (1995) (failure to develop and preserve putative error below precludes review), petitioner has failed to preserve any error for appellate review.

II.

ADEQUACY OF TRIAL COURT REVIEW

Petitioner argues that *BMW* included a guidepost not previously addressed in the caselaw and that, therefore, the review by the trial court was inadequate: *i.e.*, lack of advance notice that the jury might be allowed to return a large award for punitive damages. However, the identical argument was rejected in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), where the appellant asserted that the procedure followed was "unconstitutionally vague" because *TXO* had no notice of the possibility of a such a large award of punitive damages. *TXO*, 509 U.S. at 463.

Petitioner argues that punitive damages are not recoverable under the West Virginia Human Rights Act or for retaliation against employees in violation of state public policy. Despite *TXO*'s admonishment concerning preservation of error, petitioner never preserved this argument by way of an affirmative defense, objections at trial, motion to dismiss, motion for summary judgment, motion for directed verdict or post-trial motion. Petitioner cannot excuse its failure to raise this issue by suggesting that notice is a new development in the caselaw following *BMW*. This factor was addressed in *TXO* and in *Garnes*. 186 W. Va. at 668. Thus, as the state appellate court found, that issue was waived by petitioner because it had not been presented to the trial court. Petitioner's App. A, pp. 19-20.

See also Garnes, 186 W. Va. at 669 (waived as a matter of state law); *Horan,* 189 W. Va. at 626 (*Garnes* issue not timely raised below is not controlling on appeal); *Browning Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 276-7 (1989) (Court refused to consider Due Process challenge to a punitive damage award which was not raised below).

Aside from the issue of petitioner's failure to preserve the "notice" argument, West Virginia has long recognized that bad conduct can lead to the award of punitive damages. In *TXO* the Court held that "the notice component of the Due Process Clause is satisfied if prior law fairly indicated that a punitive damages award might be imposed in response to egregiously tortious conduct." *Id.* at 465-6 (citing *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. 1, 24, n.12 (1991)). The *TXO* Court further noted that prior law in West Virginia and elsewhere unquestionably placed appellant on notice that the bad conduct which formed the basis of the punitive damage award has its consequences. As the *TXO* Court recognized, West Virginia has long allowed for the recovery of punitive damages for egregious conduct. *Id.*

The principle that egregious conduct could lead to punitive damages was recently affirmed in *Alkire v. First National Bank*, 197 W. Va. 122, syl. pt. 4, 475 S.E. 2d 122 (1996), where the state court, quoting a one hundred year old case, *Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895), again held that

> in actions of tort, where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear, or where legislative enactment authorizes it, the jury may assess exemplary, punitive, or vindicative damages; these terms being synonymous.

West Virginia has long recognized that punitive damages can be recovered for bad conduct associated with a wrongful termination. *Harless v. First National Bank of Fairmont*, 162 W. Va. 116, 246 S.E. 2d 270 (1978); *Mace v. Charleston Area Medical Center Foundation, Inc.*, 188 W. Va. 57, 422 S.E. 2d 624 (1992); *see also Dobson v. Eastern Associated Coal Company*, 188 W. Va. 17, 422 S.E. 2d 494 (1992) (tort damages long recognized as recoverable for violations of the West Virginia Human Rights Act).[4] Petitioner had sufficient notice that punitive damages may be recoverable.

Next, petitioner argues that the amount of the award was too much when compared to the net worth of the company. Petitioner should not be heard to complain about the amount of the punitive damage awards in this case because it failed to diligently challenge these damages at trial. In *Pasquale v. Ohio Power Company*, 187 W. Va. 292, 418 S.E. 2d 738 (1992), the West Virginia Supreme Court of Appeals held:

> [W]here a defendant asserts that the plaintiff's damage verdict is excessive, before considering such assertion, we will examine the record to see if the defendant made a reasonably diligent effort to contest the damages. From a review of this record, we find that the power companies virtually abandoned any reasonable effort to contest or properly object to the plaintiff's damage evidence and arguments.

Id., 187 W. Va. at 310.

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4. Petitioner cites *Harmon v. Higgins*, 426 S.E. 2d 344, 346 (1992) as authority for the point that punitive damages are not available under the West Virginia Human Rights Act. That issue was not before the state court in *Harmon* and the cite by petitioners is *dicta*. The other case cited by petitioner, *Guevara v. K-Mart Corp.*, 629 F. Supp. 1189 (S.D. W. Va. 1986) is the federal court's interpretation of state law and is not consistent with *Alkire, Mayer, Harless, Mace* and *Dobson*.

In the case at bar, petitioner was not reasonably diligent in contesting damages (*see, e.g.*, 9/13/95 Tr. at 48-51, Respondent's App. E), did not present any contrary evidence to the jury regarding the wealth of the company, did not make any effort to explain the wealth of the company, and did not present any argument either during trial or at the post-trial motion stage regarding the company's wealth.

Petitioner objected to the lower court's jury instruction on punitive damages solely on the following basis: "Was objected to as Defendant did not feel that there was sufficient evidence for a punitive instruction to go to the jury." (9/14/95 Tr. at 80, Respondent's App. C). Petitioner made no objection to the trial court's punitive damages instruction on the basis that it was an incorrect statement of law, and, thus, waived any objection to the form and substance of the punitive damage instruction. As the West Virginia Supreme Court has often repeated,

> [a] party may only assign error to the giving of instructions if he objects thereto before arguments to the jury are begun stating distinctly the matter to which he objects and the grounds of his objection.

Horan, 189 W. Va. at 626, *quoting Roberts v. Powell*, 157 W. Va. 199, 207 (1973).

Whether petitioner in this civil action *should have* raised constitutional issues below is not a Due Process concern. The Due Process concern is whether the petitioner had the opportunity to raise constitutional issues. Petitioner had many opportunities to raise constitutional issues but failed to do so.

III.

PETITIONER RAISES NO IMPORTANT CONSTITUTIONAL QUESTIONS

BMW and *TXO* require that the procedures used in assessing and reviewing punitive damages impose meaningful constraints on the fact finder's discretion. In this case, the jury was properly instructed on the issue of whether to award punitive damages and upon how punitive damages should be calculated. The award of punitive damages was then fully reviewed by the trial court to ensure the reasonableness of the award based on facts of record and as presented during post-trial motions. The trial court's findings of fact and the record were again reviewed by the state appellate court with the benefit of this Court's decision in *BMW* to ensure compliance with Due Process principles and to guard against excessiveness. Given the failure of petitioner to raise and preserve for review federal questions now presented, the state appellate court sensibly issued a *per curiam* decision.

In *Browning Ferris Industries*, 492 U.S. at 278, the Court held that

> . . . where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law.

Petitioner by necessity is asking this Court not only to review the punitive damage award and the *Garnes* factors, but to disregard a host of West Virginia cases concerning the need to preserve error.

Petitioner argues that Congress, some state legislatures, and certain courts protect out-of state corporations from the

"problem" of punitive damages by capping punitive awards, bifurcating liability and punitive damage determinations, providing "more detailed guidance" to juries on punitive damage concepts, etc. Petitioner's Writ, p. 25. Given that in this case petitioner did not seek to bifurcate liability[5] and punitive damages, did not object to the substance of the trial court's detailed punitive damage instruction, did not participate in the *Garnes* review, and in fact the state supreme court reduced one of the punitive damage awards to a five to one ratio, petitioner's argument that West Virginia provided it with no protection from "capricious punitive damage awards" is truly misplaced. *Id.* West Virginia law provides ample protection. Petitioner just failed to avail itself of that protection.

At best, petitioner's argument is simply that the state appellate court correctly stated but misapplied *BMW* based upon the record preserved and presented. The fact intensive analysis performed by the trial and appellate courts in this case during their separate reviews of the punitive damage awards is not readily transformed into guiding principles of constitutional magnitude, particularly where constitutional issues were not raised in the first instance.

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5. Bifurcation is an option under West Virginia law, *see Mace v. Charleston Area Medical Center Foundation, Inc.*, 188 W. Va. 57, 422 S.E. 2d 624 (1992).

CONCLUSION

Respondent respectfully suggests that this Court decline petitioner's writ of certiorari because no important federal issue is preserved or raised therein.

Respectfully submitted,

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APPENDIX A — EXCERPTS FROM 9/13/95 TRIAL TRANSCRIPT, PAGE 53

[53] ahead, sir, and make your motion?

MR. BENTLEY: Your honor, with regard to any back wages extending back from the date or from October 12, 1994, would be our position that the Plaintiff has failed to make a prima facie case showing that there was any demand made by the Plaintiff to return to work during a period prior to that date. And that there was no return to work authorization provided to her by her physician as her physician testified, both of those things being required before the employer is required to consider reinstatement — reemployment. Doctor Troup said in his testimony that he had not prior to November 4 of '94 provided her with any return to work authorization. She said in her testimony that she did not get any return to work authorization prior to that date. So I think those things, combined with the law found in 23-5(A)-3 would preclude back wages prior to — as early as October 12th. Probably not before November 4th of '94. And I would ask that you direct at this point that the jury not be permitted to consider back wages prior to that date.

COURT: Mr. Waddell, anything?

MR. WADDELL: I am indemnified so I don't think I should take a position on that argument, no matter what I feel personally.

APPENDIX B — EXCERPTS FROM 9/13/95 TRIAL TRANSCRIPT, PAGE 188

[188] MR. BENTLEY: No objection, Your Honor.

COURT: Mr. Hammer?

MR. HAMMER: No objection, Your Honor.

COURT: Okay. The rest of the instructions we will take up tomorrow morning at 9:00 o'clock. Now we are at the stage where I would anticipate that there would be motions made. Mr. Bentley renews his motions for the grounds previously stated and says that it is all the more obvious now that the Court should have granted it earlier.

MR. BENTLEY: That's correct, Your Honor.

COURT: And Mr. Waddell, do you wish to be heard on that point?

MR. WADDELL: On his motion, Your Honor?

COURT: Yeah.

MR. WADDELL: I don't believe so.

COURT: You have been so neutral in this case.

MR. BENTLEY: With notable exceptions.

COURT: Mr. Hammer, do you wish to add anything further to the position that was stated earlier at the benchside by either yourself or the colleague, whoever had leave to approach the bench at that time?

MR. HAMMER: I don't believe there has been any additional evidence on that point for the Defendant's . . .

APPENDIX C — EXCERPTS FROM 9/14/95 TRIAL TRANSCRIPT, PAGE 80

[80] MR. BENTLEY: We objected to as Defendant did not feel that there was sufficient evidence for a punitive instruction to go to the jury.

MR. HAMMER: Plaintiff objected to Defendant's Instruction Number 1 on the basis that it is not an accurate statement of the law insofar as statements in the Workers Compensation report of injury Form 123 to reflect that the employer does not dispute the compensability of the injury is inconsistent with the statutory language. Plaintiff objected to Instruction Number 2 on the basis that the word only is not in the statute. And in fact there is another basis listed in the statute — strike that. Simply say that the word only is not listed in the statute and the implications arising from that may improperly confuse and mislead the jury in believing that the fact that someone is granted temporary total disability benefits means that they were unable to work. Plaintiff objected to Defendant's proposed Instruction Number 4 on the basis that it was contrary to the law. The case cited of Walk v. State Compensation Commissioner addresses the issue of permanent partial disability. It does not say the temporary total disability benefit compensation is intended to take the place of the ability to work. That is contrary to the . . .

* * *

APPENDIX D — EXERPTS FROM DEFENDANT SHEETZ, INC.'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND/OR FOR A NEW TRIAL AND/OR REMITTITUR AND MEMORANDUM IN SUPPORT THEREOF, PAGES 19-21

[19] picture. The recovery for emotional distress as well as other compensatory damages such as lost wages should adequately compensate the plaintiff." Id. at W. Va. 692, S.E.2d 703.

There are instances where emotional distress damages *and* punitive damages may be appropriately awarded. "[W]here the employer's conduct is wanton, willful or malicious, punitive damages may be appropriate." Id. at W. Va. 692, S.E.2d 703.

In *Mace v. Charleston Area Medical Center Foundation,* 188 W. Va. 57, 422 S.E.2d 624 (1992), our Court recalled several examples of the kind of egregious conduct which would make punitive damages appropriate in a case where emotional distress were awardable.

"[S]uch a situation may arise where the employer circulates false or malicious rumors about the employee before or after the discharge or engages in a concerted action of harassment to induce the employee to quit or actively interferes with the employee's ability to find other employment." *Mace, supra.,* 188 W. Va. at 67, 422 S.E. 2d at 634.

In *Mace,* the court found no such conduct and overturned the punitive damage award. No such conduct was presented by Plaintiff in the instant case. To the contrary, she was considered and spoken of as a good employee and Plaintiff testified that she was treated well by her fellow employees and managers, one of whom she testified was her good friend.

Of course, the reasoning — the law — which our Court has

developed in this regard applies just as appropriately to the damages awarded attendant to the three directed counts. The emotional distress damages of $120,000.00 are appropriate, as tort damages.

But, what of the $1,575,000.00 punitive damage award? There was no mean-spirited, malicious conduct on the part of the Defendant toward the Plaintiff. As the Court noted at trial, at worst, Defendant's actions were "really stupid." Justice Richard Neely, in our Supreme Court's now famous *TXO Production* case, defined the really stupid defendant thusly: ". . . those defendants who have not harmed victims intentionally, but have harmed them as a result of extreme carelessness — in most cases caused by a foul up in the middle of some corporate bureaucracy . . ." *TXO Production Corp. v. Alliance Resources Corp., et al.*, 187 W. Va. 457, 475, 419 S.E.2d 870, 888 (1992).

There was no evidence presented at trial that the Defendant's actions were willful, wanton, malicious or mean-spirited.

The mental distress and punitive damage elements constitute double recoveries with regard to both the directed verdicts and the retaliation claim. Without the malicious, mean-spirited characterization, punitive damages were and are inappropriate in this case and must be a part of the remittitur sought by the Defendant herein.

Punitive damages are inappropriate in this case where there was an appropriate claim for mental distress but, without any physical trauma. "[A] jury may weigh the defendant's conduct in assessing the amount of damages and to this extent emotional distress damages may assume the cloak of punitive damages." *Harless, supra*, at 701.

Additionally, the punitive damages award totaling $2,699,000.00, in this case is clearly excessive under any analysis. Even if a punitive award were appropriate under the "really stupid" characterization, as the *TXO* Court opined, "In cases in which the defendant falls into the really stupid category, and compensatory damages are neither negligible nor very large . . . we hold that the outer limit of punitive damages is roughly five to one." *TXO Production Corp.*, at W. Va. 476, S.E.2d 889. The compensatory damages awarded by the jury in the instant case cannot be termed negligible. The award was large and the emotional distress aspect made the Plaintiff more than whole. Accordingly, even if the facts of this case were such that punitive damages were appropriate for consideration, they would necessarily have to be considered closer to the multiplier of *one* than to *five* (times the compensatory damages).

The instant case is one in which there was no physical trauma to the Plaintiff but, there was alleged emotional distress. The four claims out of which the damages flowed, if they ultimately stand, can only be found to have been caused by the careless and negligent actions of the defendant. They all, however, carry indicia of intent. Accordingly, these tort claims appropriately included, as an element of damages, emotional distress.

Emotional distress, in such cases, assumes the cloak of punitive damages and makes punitive damages duplicative and inappropriate to this type of case.

Absent evidence of maliciousness or mean-spiritedness, punitive damages cannot be recovered. There was no such showing made by the Plaintiff in the instant action. Therefore the Court is requested to grant the Defendant's motion for

remittitur and diminish the jury's verdict by the full amount of the punitive damages, $2,699,000.00.

The jury awarded $52,281.00 for lost back wages. Wage replacement in the total amount of $31,395.00 from October 1, 1992 through September 13, 1995, has been paid in the form of temporary total disability payments to the Plaintiff. The verdict must be reduced by this amount. There clearly will be additional benefits paid to the Plaintiff which should reduce future wage loss, if such future loss is sustained.

In addition, the jury awarded double future damages and futures in excess of that proven. Since such damages must be proven to a reasonable degree of certainty, Defendant requests the verdict be reduced by the entire $52,281.00 award. At the very least, however, the Court should . . .

* * *

APPENDIX E — EXCERPTS FROM 9/13/95 TRIAL TRANSCRIPT, PAGES 48-51

[48]

* * *

BY MR. BENTLEY:

Q. Mr. Lantzy, how are you?

[49] A. Pretty good.

Q. I'm Norwood Bentley. As you have indicated, you have done work for my firm before, so I won't quibble with your qualifications. What with regard to the future wages that you set forth, and I think you said those were Twenty-Four Thousand Four Hundred Ninety-Seven Dollars?

A. That's correct.

Q. Is that the present value?

A. That's correct. No inflation has been taken into consideration.

Q. And so you didn't add any inflation into that?

A. That's right. They were all calculated at $5.85 per hour.

Q. Now the total revenues that you have put up on the board, those don't mean profits? Those are not all moneys that are available to Sheetz, what Sheetz has available to it to do whatever it wants to at their discretion?

A. That's correct. It is more closely that would be the net income that we had talked about.

Q. That's right. And you don't really learn a whole lot from total revenues?

A. If you don't make the total revenues, you don't make the bottom line.

[50] Q. But you don't learn a great deal about what can be done with that money that — the figures that you want to look at for purposes of a case like this are other figures, is that right? Other figures that you have mentioned?

A. I mean, it depends on what you are looking at.

Q. Well, if you are looking at discretionary money to do something with, you wouldn't look necessarily at total revenues?

A. That's correct.

Q. I only have one other question, and that is with regard to the insurance benefits that you figured in, I wanted to make sure I understand — understood properly how you figured that in. I understood I thought you to say that you used the same level of inflation for the increase in costs of insurance as you did for the increase in wage rate?

A. That's correct.

Q. And is that something that is done in your business all the time? Is that an equivalent rate?

A. There is a — the cost of health insurance back in '92 is less than it is in 1995, all right. So the question is, how much less.

Q. Right.

[51] A. The methodology I used was based on the wages. That was just the methodology coming up and saying there is no question that it is less in '92, how much less. And I used the increase in wages as an indication of the inflation.

Q. Did you look at actual insurance rates in '92?

A. No.

Q. Do you have any literature or basis on which you made the decision to use the same inflation rate for both?

A. No.

Q. You just assumed that?

A. That's correct. It is less.

Q. So that if the rate were different for the increase in costs for insurance, then the actual numbers would be different than what you put on the board?

A. That's correct. That's correct.

MR. BENTLEY: Thank you.

MR. WADDELL: I'm here. I have no questions.

Appendix E

MR. HAMMER: Nothing further, Your Honor.

COURT: May I release the witness?

MR. HAMMER: Please.

COURT: Thank you, sir. Plaintiff may call her next witness.

Supreme Court, U.S.
FILED
JAN 5 1998

(3)

No. 97-891

In The

Supreme Court of the United States

October Term, 1997

SHEETZ, INC.,

Petitioner,

v.

CHERYL L. VANDEVENDER,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

In the opposing brief submitted by Respondent in this case, Respondent asserts that Petitioner's Writ of Certiorari should be denied not for reasons relating to the merits of the case but because Petitioner failed to preserve a federal question for appellate review. Respondent's assertion is simply contrary to the facts and the law in this case.

In the first instance, in Petitioner's Motion for Judgment Notwithstanding the Verdict and/or For a New Trial and/or Remittitur and Memorandum In Support Thereof, Petitioner timely raised the issue of the constitutionality of the punitive damages awards before the trial court.[1] Respondent's App. 6a. Petitioner preserved this constitutional issue in its Petition for Appeal to the West Virginia Supreme Court of Appeals wherein it argued that the punitive damages awards should be set aside because they were grossly excessive in violation of the Due Process Clause.

Furthermore, it is clear from a review of the state supreme court's decision in this case that the federal issue as to the constitutionality of the punitive damages awards was addressed, considered and decided by the state supreme court.[2] In its decision the state supreme court set forth the federal issue presented on appeal.

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[1] Respondent faults Petitioner for failing to assert any affirmative constitutional defense to punitive damages in its answers to Respondent's complaint and amended complaint. It is obvious that it is impossible to object to the excessiveness of a verdict until the excessive verdict is returned.

[2] Even Respondent concedes that the state supreme court considered the constitutional issue. ("Now, although the

> Sheetz asserts that under the standards set forth by the United States Supreme Court in *BMW of North America, Inc. v. Gore*, ___ U.S. ___, 116 S. Ct. 1589 (1996), the punitive damages award was grossly excessive in violation of Sheetz' due process rights.

Petitioner's App. 11. The state supreme court did not find such issue to be waived but rather undertook a lengthy examination of such issue. The state supreme court stated, "Returning to the *crux of this appeal*, we must now examine whether the punitive damages award was excessive." Petitioner's App. 26 (emphasis added). In reviewing the constitutionality of the award, the state supreme court rejected Petitioner's argument that *BMW* altered the factors to be considered in reviewing a punitive damages award. The court stated:

> While we disagree with Sheetz' contention that *BMW* somehow altered the review factors previously identified in *Garnes*, we do wish to address this argument. While the *BMW* decision clearly delineates three "guideposts" for use in connection with the review of punitive damage awards, these so-called "guideposts" are merely reiterations of factors previously-adopted by both this Court and the United States Supreme Court. Contrary to Sheetz' position that *BMW* somehow alters this State's law on punitive

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appellate court reviewed the punitive damage awards for excessiveness and expressly found that the trial court's review included each of the 'guideposts' addressed in *BMW v. Gore*, 517 U.S. ___, 116 S. Ct. 1589 (1996) (Petitioner's App. A, p. 33), Petitioner argues that, first, the trial court's review and, next, the appellate court's review violated its constitutional right to Due Process.") Respondent's Brief, p. 6.

> damages review, each one of the "guideposts" was in fact applied by the trial court in its review of this case. Other than utilizing the "guidepost" terminology, *BMW* does not depart from existing law regarding punitive damages.

Petitioner's App. 33.

In its decision the state supreme court considered (and rejected in part) Petitioner's argument that the punitive damages awards were grossly excessive.[3] Petitioner's appeal to vacate the punitive damages awards for federal constitutional reasons was denied on the merits, not for the reason that the issue was not preserved for appeal. The state supreme court's consideration of and ruling on the constitutional question creates an irrebuttable presumption that the federal question was properly preserved. *See, e.g., Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991) ("It is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided."); *Orr v. Orr*, 440 U.S. 268, 274-75 (1979) ("[I]t is irrelevant to inquire when a Federal question was raised in a court below when it appears that such question was actually considered and decided. . . . " (quoting *Manhattan Life Ins. Co. of New York v. Cohen*, 234 U.S. 123,

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[3] The state supreme court determined that since Petitioner's conduct toward Respondent with regard to Respondent's claims for unlawful termination and failure to rehire lacked evidence of malice or intent to harm the Respondent, the punitive damages awarded in connection with such claim should be reduced by $466,260. The court upheld the $1,124,000 punitive damage award in connection with Respondent's retaliation claim.

134 (1914)); *Raley v. Ohio*, 360 U.S. 423, 436 (1959) ("There can be no question as to the proper presentation of a federal claim when the highest state court passes on it.").

Respondent takes the position that the federal constitutional issues presented in this case were not preserved. As set forth above, such position is both inaccurate and irrelevant. As this case now comes before this Court, the Respondent is the beneficiary of a multi-million dollar punitive damage award granted to her as a result of receiving a form termination letter and lifting a six-pack of soda.

In light of the Respondent's misplaced reliance on waiver arguments and failure to address the issues presented in Petitioner's Writ of Certiorari, the need for plenary review of the punitive damages awards in the action below is required. Accordingly, Petitioner's Writ of Certiorari should be granted.

Respectfully submitted,

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